United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

75-1011 75-1017

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS McNAMARA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX for APPELLANT McNAMARA

VOLUME I
(Pages 1a through 578a)

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UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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73 Cr. 442

DATE	PROCEEDINGS
5- 2-73	Before Judd J—Indictment sealed by the Court —Bench Warrant Ordered.
5- 2-73	Bench Warrant Issued.
5- 8-73	Before DOOLING, J.—Case called—Sealed indictment ordered open by the Court—Deft T. MC NAMARA not present in hospital—Bench Warrant cancelled—Defts JOHN DEELISO, ALFONSE MEROLLA, AGNELO MEROLLA and R. MEROLLA counsel present—(and deft J. MC NAMARA)—Defts produced on a bench warrant and arraigned and enter pleas of not guilty—Defts to post a P.A. Bond the amounts of $10,000.00—Bail limits as to ALPHONSE MEROLLA extended include Penn. upon prior notice to govt—Deft ALPHONSE MEROLLA to surrender his Passport to the U.S.—Bail limits to J. MC NAMARA to be extended upon prior notice to govt.—Initial conference scheduled for 6/8/73
5- 8-73	Bench Warrant retd and filed. Executed as to all deft but T. MC NAMARA.
5- 8-73	Notice of Appearances filed (for defts T. MCNAMARA and R. MEROLLA)

Docket Entries

DATE	PROCEEDINGS
5-17-73	Before DOOLING, J.—Case called—Deft T. MC NAMARA not present—Counsel J. Hoey present —Deft in hospital—Pleading adjd to 5/24/73.
5-17-73	Notice of Appearance filed. (for deft MC NAMARA)
5-24-73	Before DOOLING J—Case called—Deft Mc-NAMARA & counsel Joseph Hoey present—deft arraigned and enters a plea of not guilty—Bail continued.
6- 1-73	Notice of Motion filed for Bill of Particulars, Inspection, etc. & Memo in support of pre trial motions (deft McNamara)
6- 1-73	Notice of Motion filed for Discovery and Inspection, etc. & Memo in support filed.
6- 1-73	Notice of Motion filed, re: Bill of Particulars, Inspection, etc. (deft ANGELO MEROLLA and ROCCO MEROLLA)
6- 4-73	Notice of Motion filed, ret. 6/8/73 filed. re: Bill of Particulars (J. MCN.)
6- 7-73	Before DOOLING, J.—Case called—Conference held and concluded—Order of Defendant's motion for bill of particulars and for discovery granted and denied: Hearing on deft MC NAMARA's motion set for 6/14/73—Trial set for week of 1/7/73
6- 7-73	Notice of Appearance filed. (J. MC NAMARA)

Docket Entries

DATE	PROCEEDINGS
6-14-73	Before DOOLING, J.—Case called—Motion for Discovery, etc. granted in part and denied in part—Deft T. MC NAMARAs motion for severance denied.
6-18-73	By DOOLING J—Conference Memorandum Order filed granting and denying motions for Discovery, Bill of Particulars, etc. (see Memo) Trial date Jan. 7, 1974, must be emphasized that in this case the highest importance is attached to making sure that the trial is brief, and that means an exhaustive set of pre-trial hearings will, if necessary, be devoted to reducing the order of magnitude of the proofs. (DE LISO, ANGELO ROCCO & ALPHONSE MEROLLA)
6-25-73	By DOOLING, J.—Order filed, that the trial will commence on Jan. 7, 1974 (JOHN DE LISO, et al)
6-28-73	By DOOLING J—Order filed on motion of deft McNamara for Bill of Particulars and Discovery, granted and denied in part; motion for severance is denied without prejudice to renewal, etc. Trial date is January 7, 1974 in court room #8.
7- 3-73	Stenographer's transcript of 6/14/73 filed.
10- 2-73	Govt's Bill of Particulars filed
10-26-73	Govts Notice of Readiness for Trial filed.
11-20-73	Govts Bill of Particulars filed (defts JOHN & THOMAS MC NAMARA)

Docket Entries

DATE	PROCEEDINGS
1 -2-74	Govts Amended Bill of Particulars filed.
1- 7-74	Before DOOLING J—Case called—defts present with counsel—Trial ordered and BEGUN—Jurors selected and sworn—Defts motion for Mistrial—Motion denied—defts open—Trial contd to Jan. 8, 1974.
1- 8-74	Letter of Dec. 28, 1973 filed from David Jordan, Appeals Bureau to Michael Gillen Esq. and letter same date to Hon. Lewis Orgel from David Jordan etc. filed (both recvd from Chambers)
1- 8-74	Before DOOLING J—Case called—defts present with counsels—Trial resumed—Trial continued to Jan. 9, 1974.
1 -9-74	Before DOOLING J—Case called—defts present with counsel—Trial resumed—trial contd to Jan. 10, 1974.
1-10-74	Before DOOLING, J.—Case called—Defts and counsel present—Trial res Trial contd to 1-11-74
1-11-74	Before DOOLING, J.—Case called—Defts and counsel present—Trial resumed Trial contd to 1-14-74
1-14-74	Before DOOLING J—Case called—defts & counsels present—trial resumed—Trial continued to 1-15-74.
1-15-74	Before DOOLING, J.—Case called—Defts and counsels present—Trial resumed Trial contd to 1-17-74

Docket Entries

DATE	PROCEEDINGS
1-17-74	Before DOOLING J—Case called—trial resumed —defts & counsels present—Trial continued to Jan. 18, 1974.
1-18-74	Before DOOLING J—case called—trial resumed Govt rests—Defts move for Judgment of Acquittal—decision reserved—R. Fischett, Esq. moves to strike testimony of Taibbi—denied. Trial contd to Jan. 21, 1974.
1-21-74	Before DOOLING J—case called—trial resumed —defts rest—defts move for Judgment of Acquittal—motion denied.
1-21-74	Request No. 1, Request No. 2 and Request No. 3 filed.
1-22-74	Before DOOLING J—Case called—trial resumed —defts summation—Govts summation—defts move for declaration of a Mistrial—Motion denied—trial contd to Jan. 23, 1974.
1-23-74	Before DOOLING, J.—Case called—Trial resumed—Jury deliberates to 1/24/74
1-23-74	By DOOLING, J.—Order of Sustenance filed.
1-24-74	12 volumes of stenographers transcripts filed (pgs 1 to 2124)
1-24-74	Before DOOLING J—case called—trial resumed —Jury deliberation resumed Jury reports disagreement—defts move for Mistrial—Motion denied (Allen Charge given) Order of Sustenance

Docket Entries

DATE	PROCEEDINGS
	signed. Jury returns with a verdict of guilty as to defts JOHN & THOMAS McNAMARA & ALPHONSE MEROLLA and with a verdict of not guilty as to defts ANGELO & ROCCO MEROLLA and report unabel to arrive at a verdict as to deft JOHN DE LISO. Defts. JOHN & THOMAS McNAMARA, ALPHONSE MEROLLA & DeLISO move for a Mistrial—Motion granted—Mistrial declared—Trial concluded—Jury discharged—Bail exonerated as to defts ANGELO AND ROCCO MEROLLA—defts JOHN & THOMAS McNAMARA, DE LISO, ALPHONSE MEROLLA contd on bail.
1-24-74	2 Orders of Sustenance filed (for lunch and transportation)
1-24-74	By DOOLING J—Judgment of Acquittal filed (ANGELO & ROCCO MEROLLA)
1-28-74	Govts Memorandum of Law filed.
1-28-74	Stenographers transcript filed dated Jan. 24, 1974. (pgs 2125 to 2180a)
2- 1-74	Govts Memorandum of Law filed.
3-11-74	Before Dooling J—case called—Conference held and contd to March 21, 1974.
3-21-74	Before DOOLING, J.—Case called—Defts DeLiso and Alphonse Merolla and counsel Fishetti present—Deft John McNamara and counsel Gillen present—Deft Thomas McNamara not pres-

Docket Entries

DATE	PROCEEDINGS
	ent, counsel Hoey present—Defts after being advised of their rights by the court, Mr. Hoey for Thomas McNamara wiave their rights to a trial within 90 days of disagreement—Scheduled for trial on 10-7-74 Pre-trial conference scheduled for 9-3-74.
3-22-74	Copy of letter filed received from Chambers to John Leone Esq. stating trial date of this case was set for Oct. 7, 1974 and Govt moved without objection to consolidate the trial of 73 CR-1066 with the retrial—and presently scheduled trial date of April 29, 1974 for 73 CR-1066 as released (letter in this filed)
5- 2-74	Letter dated 4-30-74 filed from J. Timothy Shea, Esq. re deft McNamara indicating that deft wishes to inform the court re 2 weeks vacation, etc. (received from Chambers)
5-10-74	By DOOLING J—Order of substitution filed (substituting Leonard J. Meiselman, Esq. for deft Thomas McNamara in place of John Hoey, Esq.
7- 1-74	Letter from Judge Dooling to deft Alphonse Merolla filed re: ability of deft to retain counsel
7- 8-74	Return receipt from Alphonse Merolla filed.
7-23-74	Memorandum to all counsel filed signed by Judge Dooling that a conference is scheduled for Tuesday, Sept. 3, 1974 at 10:00 am. The trial of the case is scheduled for Monday, Oct. 7, 1974 @ 10:00 am.

Docket Entries

DATE	PROCEEDINGS
8-26-74	Copy of letter filed dated 8-26-74 to deft Merrolla, Alphonse, from Judge Dooling to the effect that Pre Trial Conference is scheduled on Sept. 3, 1974 and presence of the deft is expected.
9- 3-74	Before DOOLING, J.—Case called—Deft John De Liso and counsel R. Fischetti Defts and counsel present—deft McNamara not present, counsel present—73CR442 and 73CR1066—Deft THOMAS MCNAMARA by counsel moves to dismiss the indictment for lack of jurisdiction, other defts join in motion—to file papers by 9-17-74—Govt to answer by 9-20-74—Argument on mot for 9-20-74—
9-16-74	Notice of motion for an order dismissing the indictment and Memorandum of law filed—ret. 9-20-74 (THOMAS MC NAMARA)
9-18-74	By DOOLING, J.—Memorandum and Order dated Sept. 17, 1974 filed that the govt has in effect taken the pre-trial deposition of a known witness in circumstances not permitted by Rule 15, etc.
9-20-74	Before DOOLING, J.—Case called—Defts and counsel present—Motions argued—granted and denied as indicated on record—case adjd to 10-7 for trial
9-23-74	Letter to all defense counsel from Law Clerk of Judge Dooling and accompanying photocopies of 3 index cards filed

Docket Entries

DATE	PROCEEDINGS
9-23-74	Stenographers transcript filed dated 9-20-74.
9-24-74	Memorandum filed to all defense counsel (dated 9-23-74) from Law Clrk to Judge Dooling and folder page etc.
9-27-74	Govt's Memorandum in Opposition to deft's motion to dismiss the indict for want of Federal Jurisdiction filed.
9-30-74	By DOOLING, J.—Memorandum and Order filed denying deft Thomas McNamara motion to dismiss
10- 7-74	Govts Memorandum of Law filed.
10- 7-74	Before DOOLING J—case called—deft John De Liso & counsel R. Fischetti present; deft John McNamara & counsel M. Gillen present; deft Thomas McNamara & counsel L. Meiselman present; deft Alphonse M. Merrolla and counsel J. Leone present; deft Alphonse Merolla and counsel M. Seltzer of Legal Aid present. counsel for deft JOHN McNamara moves for dismissal of the indictment—motion denied—Govt moves to sever as to deft John McNamara—motion granted—Jury selection begun not completed—trial contd to October 8, 1974.
10- 8-74	Stenographers transcript filed dated 10-7-74.
10- 8-74	Before DOOLING J—case called—Defts & attys present—(case as to deft John McNamara severed) Trial resumed—Jurors selected and

Docket Entries

DATE	PROCEEDINGS
	sworn—Govts opening—Defts De Liso, Thomas McNamara & Alphonse M. Merolla opening—deft Alphone Merrolla waives opening statement. Trial contd to Oct. 9, 1974.
10- 9-74	Before DOOLING, J.—Case called—Defts and counsel present—Trial resumed Trial contd to 10/10/74
10- 9-74	Stenographers Transcript dated 10/8/74 filed
10-10-74	Before DOOLING, J.—Case called—Defts and counsel present—Trial resumed Trial contd to 10/11/74
10-11-74	Stenographers transcript filed dated Oct. 10, 1974.
10-11-74	Stenographers transcript filed dated Oct. 9, 1974
10-11-74	Before DOOLING, J.—Case called—Defts and counsel present—Trial resumed Trial contd to 10/15/74
10-15-74	Before DOOLING, J.—Case called—Defts and counsel present—Trial resumed Deft ALPHONSE MEROLLA moves to suppress his identification by agent—Hearing ordered and begun—on motion to suppress—Hearing concluded —Motion to suppress denied—Trial contd to 10/16/74
10-16-74	Before DOOLING, J.—Case called—Defts and counsel present—Trial resumed Trial contd to 10/17/74

Docket Entries

DATE	PROCEEDINGS
10-17-74	Before DOOLING, J.—Case called—Defts and counsel present—Trial resumed Trial contd to 10/18/74
10-18-74	Before DOOLING, J.—Case called—Defts and counsel present—Govt rests—Defts move for judgment of acquittal—Decision reserved—Trial contd to 10/21/74
10-21-74	Before DOOLING J—case called—defts & counsels present—trial resumed—Deft McNamara rests—Deft De Liso moves for the court to inform the Jury that Angelo & Rocco Merolla were acquitted at the prior trial or that that information be elicited from a witness—defts Alphonse M. Merolla & Alphonse Merolla join in deft De Liso's motion—motion denied—defts DE LISO ALPHONSE M. & ALPHONSE MEROLLA rest. Defts all renew motions for judgment of acquittal and for dismissal of the complaint—and to strike the testimony of Harold Goberman—Decision reserved—summation for deft THOMAS McNamara—trial contd to Oct. 22, 1974
10-22-74	Before DOOLING J—case called—trial resumed —defts present with attys—aummation for defts —summation for Govt—Jury charged—Order of Sustenance signed—Marshals sworn—Alternate Jurors discharged.
10-22-74	By DOOLING J—Order of Sustenance signed and filed—Lunch, (17 persons)

Docket Entries

DATE	PROCEEDINGS
10-23-74	Before DOOLING J—case called—defts & attys present—trial resumed—Jury deliberations resumed—Order of Sustenance signed—Jury returns with verdicts of not guilty as to defts. DE LISO & ALPHONSE MEROLLA and verdicts of Guilty as to defts THOMAS MC NAMARA & ALPHONSE M. MEROLLA. Jury polled—Jury discharged—Trial concluded—Bail exonerated as to defts DE LISO & ALPHONSE MEROLLA—bail continued as to defts MC NAMARA & ALPHONSE M. MEROLLA Defts MC NAMARA & ALPHONSE MEROLLA moved to dismiss on interstate commerce reserved issues and to set aside the verdict and for Judgment of Acquittal —Decision Reserved—deft MC NAMARA Moves to dismiss the Indictment for lack of prosecution or an immediate trial. Motion to dismiss for lack of prosecution denied without prejudice with leave to renew—case as to deft John McNamara scheduled for trial on Feb. 10, 1975
10-23-74	By DOOLING J—Order of sustenance filed—lunch—14 persons.
10-23-74	By DOOLING J—Judgment of Acquittal filed (DE LISO & ALPHONSE MEROLLA.)
11- 7-74	Stenographer's transcripts of 10/21/74, 10/22/74 and 10/23/74 filed.
11- 7-74	Voucher for expert services filed

Docket Entries

DATE	PROCEEDINGS
11- 7-74	Stenographers Transcript dated 10/11/74, 10/15/74, 10/16/74, 10/17/74 and 10/18/74 filed
1- 3-75	Before DOOLING J—case called—deft ALPHONSE MEROLLA & counsel Marion Seltzer of Legal Aid present; deft renews motion to dismiss, Judgment of Acquittal, set aside the verdicte, etc. Motions denied. Deft is sentenced to imprisonment for 3 years pursuant to 18:3651; deft to serve 3 months in a jail type institution and execution of remainder of sentence, that is 33 months, is suspended and the deft is placed on probation for 5 years. Clerk is directed to file a Notice of Appeal forthwith on defts behalf without fee. Bail contd pending appeal.
1- 3-75	Judgment and Commitment and Order of Probation filed—certified copies to Marshal and Probation (ALPHONSE MEROLLA)
1- 3-75	Notice of Appeal filed without fee (ALPHONSE MERROLLA)
1- 3-75	Docket entries and duplicate of Notice mailed to the C of A (ALPHONSE MERROLLA)
1- 3-75	Before DOOLING J—sentence adjd to Jan. 10, 1975 as to deft THOMAS MC NAMARA.
1-10-75	Before DOOLING J—case called—deft Thomas Michael McNamara & counsel Leonard Meiselman present—deft renews motion previously made—motions denied—Deft is sentenced to 3 years im-

Docket Entries

DATE	PROCEEDINGS
	prisonment pursuant to 18:3651—deft to serve 3 months to a jail type institution and execution of the remainder of sentence, that is, 33 months is suspended and the deft is placed on probation for 33 months and deft is fined $5,000. Deft to execute a P.A. Bond of $10,000. Execution of sentence stayed pending appeal, limits extended to include all of the U.S. Trial date as to deft John McNamara previously set for 2-10-75 adjd without date pending approval of Washington for dismissal.
1-10-75	Judgment and Commitment and Order of Probation filed—certified copies to Marshal and Probation (THOMAS McNAMARA)
1-14-75	Notice of appeal filed (THOMAS McNAMARA)
1-14-75	Docket entries and duplicate of notice of appeal mailed to court of appeals (THOMAS McNAMARA)

Indictment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 CR 442

18 U.S.C. §§1951

UNITED STATES OF AMERICA

—VS—

JOHN DE LISO JOHN MCNAMARA THOMAS MCNAMARA
ALPHONSE MEROLLA ANGELO MEROLLA ROCCO MEROLLA,

Defendants

THE GRAND JURY CHARGES:

COUNT I

1. That from on or about March 1, 1972, up to and including June 28, 1972, both dates being approximate and inclusive, within the Eastern District of New York, HarMac Contracting Corporation was engaged in the construction and preparation for construction of a building on behalf of the defendant THOMAS MCNAMARA and the McNamara Re New Cars, Incorporated which building was to be utilized in connection with the service and sale of new automobiles, parts of which were to be manufactured in other states and transported in interstate commerce to the said building and that for the purpose of performing the aforesaid building construction, the HarMac Contracting Corporation, transported, moved and

caused to be moved, articles, commodities and materials, supplies, men and machinery in interstate commerce between various parts of the United States and the State of New York to the site of said building construction within the State of New York.

2. At all times pertinent hereto, Harold Goberman was the sole shareholder in and president of the HarMac Contracting Corporation and a party in the contract with McNamara Re New Cars, Incorporated for the construction of the building mentioned in paragraph one, whose interests in and under the contract were assigned to the HarMac Contracting Corporation.

3. From on or about June 1, 1972, up to and including the date of the filing of this indictment, both dates being approximate and inclusive, in the Eastern District of New York, the defendant JOHN DE LISO, the defendant JOHN MCNAMARA, the defendant THOMAS MCNAMARA, the defendant ALPHONSE MEROLLA, the defendant ANGELO MEROLLA, and the defendant ROCCO MEROLLA, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with one another and with divers other persons to the Grand Jury unknown, to obstruct, delay and affect commerce and the movement of articles and commodities in such commerce by extortion, as that term is defined in Section 1951 of Title 18, United States Code.

4. It was a part of the said conspiracy that the defendant JOHN DE LISO, the defendant JOHN MCNAMARA, the defendant THOMAS MCNAMARA, the defendant ALPHONSE MEROLLA, the defendant ANGELO ME-

ROLLA, and the defendant ROCCO MEROLLA, and other co-conspirators would obtain the property of the HarMac Contracting Corporation and of Harold Goberman, to wit, 1) the sum of $1300 which was the property of HarMac Contracting Corporation; 2) a trailer-type vehicle, which was the property of Harold Goberman and was utilized in the construction of the building mentioned in paragraph one; 3) a contract release, which was executed by Harold Goberman on June 28, 1972 which released the defendant THOMAS MCNAMARA and McNamara Re New Cars, Incorporated from contractual obligations in excess of $25,000 for a consideration of $25,000 and; 4) other goods and services as requested by the defendant THOMAS MCNAMARA, which were not contractually required; all of which property was to obe obtained with the consent of Harold Goberman and of HarMac Contracting Corporation, such consent to be induced by the wrongful use of physical violence and the threat of physical injury and damage to the person and property of Harold Goberman and of the HarMac Contracting Corporation, by the said defendants and co-conspirators, unless and until the said HarMac Contracting Corporation and Harold Goberman, gave such properties to the defendant THOMAS MCNAMARA and McNamara Re New Cars, Incorporated.

(Title 18, United States Code, Section 1951)

A True Bill

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FOREMAN

ROBERT A. MORSE
UNITED STATES ATTORNEY

Bill of Particulars

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 CR 442

UNITED STATES OF AMERICA

—v—

THOMAS MCNAMARA, *etal*

Defendants

DAVID J. RITCHIE, says:

That he is a Special Attorney assigned to the prosecution of the above entitled case.

That in response to a demand for a Bill of Particulars by the defendant the following is submitted:

Response to Query 2(a): The contract referred to in paragraph 2 of the indictment was dated ostensibly on February 24, 1972.

Response to Query 2(b): The consideration (or "contract sum") set out in Article 5 of the contract is $343,550.00.

Response to Query 3 as ordered per Judge Dooling: (1) On or about June 5, 1972, an incident of violence to the person of Harold Goberman occurred at McNamara Buick Pontiac, Inc. with Thomas McNamara.

Response to Query 3 as ordered per Judge Dooling: (2) On or about June 28, 1972, at the same place, another

incident of violence to the person of Harold Goberman occurred.

(b-c) It will be claimed that on June 5, 1972, Mr. Thomas McNamara did join in with others in striking Harold Goberman.

(e) The nature of the other goods and services is unknown. They were never, in fact, requested.

(f) As a result of the wrongful use of physical violence and the threat of physical injury and damage to the person and property of Harold Goberman and the HarMac Contracting Corporation, the following articles of property were, in fact, acquired by the defendant Thomas McNamara: (1) a signed motor vehicle form respecting the the trailer used by Goberman and HarMac; (2) a contract release, signed by Harold Goberman on June 28, 1972.

Respectfully submitted,

/s/ David J. Ritchie
David J. Ritchie
Special Attorney

Dated: Brooklyn, New York
October 2, 1973

Motion to Dismiss Indictment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket No. 73 CR 442

UNITED STATES OF AMERICA

—VS—

JOHN DE LISO JOHN MCNAMARA THOMAS MCNAMARA
ALPHONSE MEROLLA ANGELO MEROLLA ROCCO MEROLLA

Defendants

Docket No. 73 CR 1066

UNITED STATES OF AMERICA

—VS—

ALPHONSE MEROLLA AKA "FAT NICKY", "PENGUIN"

Defendant

NOTICE OF MOTION

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of LEONARD J. MEISELMAN, duly sworn to the 16th day of September, 1974, the indictment herein, the exhibits attached hereto, and upon all the proceedings heretofore had herein, the undersigned will move this Court before United States District Judge John F. Dooling, Jr., the

duly assigned Trial Judge, at the United States Courthouse, 225 Cadman Plaza East, Borough of Brooklyn, City and State of New York, on the 20th day of September, 1974, at 4:30 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, for an order (1) dismissing the indictment against the defendant, Thomas McNamara, pursuant to Rule 12(b)(1) of the Federal Rules of Criminal Procedure, on the ground that the Court does not have jurisdiction thereof, and (2) for an examination of the Grand Jury Minutes pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, together with such other and further relief as to this Court may seem just and proper.

Dated: Mineola, New York
September 16, 1974.

Yours, etc.,

/s/ LEONARD J. MEISELMAN
LEONARD J. MEISELMAN
MEISELMAN & REILLY
Attorneys for Defendant,
Thomas McNamara
Office & P. O. Address
170 Old Country Road
Mineola, New York 11501
Tel. (516) 248-2400

Motion to Dismiss Indictment

To:

United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Ronald P. Fischetti, Esq.
Attorney for Defendant,
John DeLiso
522 Fifth Avenue
New York, New York 10036

Grunewald, Turk & Gillen, Esqs.
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John McNamara
16 Court Street
Brooklyn, New York 11241

John Leone, Esq.
Attorney for Defendant,
Alphonse Merolla
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Brooklyn, New York 11201

Ms. Marion Seltzer
Federal Defender Services Unit
Legal Aid Society
Attorney for Defendant,
Alphonse Merolla
26 Court Street
Brooklyn, New York 11201

Affidavit of Leonard J. Meiselman

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket No. 73 CR 442

UNITED STATES OF AMERICA,

—v.—

JOHN DE LISO, JOHN MCNAMARA, THOMAS MCNAMARA, ALPHONSE MEROLLA, ANGELO MEROLLA, ROCCO MEROLLA,

Defendants.

Docket No. 73 CR 1066

UNITED STATES OF AMERICA,

—v.—

ALPHONSE MEROLLA, aka "FAT NICKY", "PENGUIN",

Defendant.

STATE OF NEW YORK,
COUNTY OF NASSAU, *ss.*:

LEONARD J. MEISELMAN, being duly sworn, deposes and says:

1. That I am an attorney duly licensed to practice law in the State of New York.

Affidavit of Leonard J. Meiselman

2. That I am a member of the firm of Meiselman & Reilly, the attorneys representing the defendant, Thomas McNamara, who is charged, along with other named defendants, in a one count indictment alleging a violation of Title 18, United States Code, Section 1951.

3. That this affidavit is submitted in support of a motion for an order dismissing the indictment against the defendant, Thomas McNamara, on the ground that the Court does not have jurisdiction thereof, and for an examination of the Grand Jury Minutes pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure.

4. That I have made and caused to be made an investigation in this matter, and make this affidavit upon information obtained thereby and from papers, documents and records in my possession.

5. That the indictment attached hereto, made a part hereof and marked Exhibit "A", recites, in substance, that from March 1, 1972 to June 28, 1972, HarMac Contracting Corporation was " * * * engaged in the construction * * * of a building on behalf of the defendant, Thomas McNamara, and the McNamara Re New Cars, Incorporated * * * "; that for the purpose of such construction, HarMac moved articles in interstate commence; that from June 1, 1972 to the date of the indictment, the defendants conspired " * * * to obstruct, delay and affect commence and the movement of articles and commodities in such commerce by extortion, as that term is defined in Section 1951 of Title 18, United States Code".

Affidavit of Leonard J. Meiselman

6. That the dates when the violence and extortion allegedly occurred are more definitively set forth as June 5, 1972 and June 28, 1972 in the Bill of Particulars dated October 2, 1973 (attached hereto as Exhibit "B").

7. That the contract for the construction of the said premises was on a AIA form and dated February 24, 1970 (sic) 1972. It was marked as an exhibit on the previous trial of this defendant. Article 14, Section 14.2.1 of the General Conditions of the contract provided the conditions under which the contract could be terminated by the owner. It reads as follows:

"14.2 TERMINATION BY THE OWNER

14.2.1 If the Contractor is adjudged a bankrupt, or if he makes a general assignment for the benefit of his creditors, or if a receiver is appointed on account of his insolvency, or if he persistently or repeatedly refuses or fails, except in cases for which extension of time is provided, to supply enough properly skilled workmen or proper materials, or if he fails to make prompt payment to Subcontractors or for materials or labor, or persistently disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or otherwise is guilty of a substantial violation of a provision of the Contract Documents, then the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may, without prejudice to any right or remedy and after giving the Contractor and his surety, if any, seven days' written notice, terminate the employment

of the Contractor and take possession of the site and of all materials, equipment, tools, construction equipment and machinery thereon owned by the Contractor and may finish the Work by whatever method he may deem expedient. In such case the Contractor shall not be entitled to receive any further payment until the Work is finished."

8. That under date of June 24, 1972, the Owner terminated the contract by written notice. A copy of such notice is attached hereto, made part hereof and marked Exhibit "C". The notice was sent by certified mail and received by the Contractor on June 26, 1972. A copy of the signed receipt is attached hereto, made a part hereof and marked Exhibit "D".

9. That on June 21, 1972, and prior to the written notice of termination, the Building Department of the Town of Brookhaven had placed a violation on the structure as being unsafe under the provisions of Part 3, Section C-301, Paragraph A, of the New York State Building Code (NY CRR, Sec. 830), and the premises were posted. The notice posted (a copy of which is attached hereto, made a part hereof and marked Exhibit "E") states, among other things:

"DO NOT CONTINUE WITH CONSTRUCTION OR USE OF PREMISES UNDER PENALTY OF FINE AND IMPRISONMENT OR BOTH."

10. That subsequent to the posting, construction could not continue. If interstate commence was affected or delayed, it was by operation of law.

11. That upon the delivery of the written notice of termination, the contract effectively came to an end. Irrespective of any several remedies that the parties thereto may have with respect to such notice, or any acts which could possibly be interpreted as a violation of a state criminal statute, the contract was, nevertheless, effectually terminated. Any actions by the parties thereto could not and would not, therefore, affect interstate commence.

12. That should the authenticity or accuracy of the facts set forth herein be challenged or placed in issue, it is respectfully requested that the Court order a pre-trial hearing to determine the same.

13. That, upon information and belief, the facts referred to herein were known to the Government when the matter was presented to the Grand Jury. It is, of course, not known whether such facts were furnished to the Grand Jury.

14. That the contract having been effectively terminated and the parties having been prohibited from proceeding by force of law, the actions of the parties would no longer "affect" interstate commence, and there could be no violation of the Hobbs Act.

WHEREFORE, it is respectfully requested that the Court enter an order dismissing the indictment against the defendant, Thomas McNamara, on the ground that the Court lacks jurisdiction thereof. It is also respectfully requested that the Court enter an order allowing the defendant to

examine the Grand Jury Minutes. In the event that the Court will not permit such examination, it is respectfully requested that the Court itself examine said Minutes to determine whether the facts furnished herein were presented to the Grand Jury, and should the Court find that such facts were not presented, enter an order dismissing the indictment on such grounds. If the Minutes show such presentation, then the indictment should be dismissed for lack of jurisdiction.

/s/ LEONARD J. MEISELMAN
LEONARD J. MEISELMAN

Sworn to before me this
16th day of September, 1974.

/s/ JOHN J. REILLY
JOHN J. REILLY
NOTARY PUBLIC, State of New York
No. 52-8533101
Qualified in Suffolk County
Commission Expires March 30, 1976

Exhibit A

[Copy of Indictment]

Exhibit B

[Copy of Bill of Particulars]

Exhibit C

[Defendant McNamara's Exhibit AQ in Evidence]

June 24. 1972.

Mr. Harry Goberman,
118 Southern Blvd.
Hauppauge, N.Y. 11787,

Re.: Contract of February 24. 1972, for Automobile Salesroom, 5184 Nesconset Highway, Port Jefferson Station, N.Y. 11776.

Dear Sir:

Notice of termination of the above contract is hereby given under article 14.2.1 of said contract, because of violations of building department regulations and breeches of contract including but not limited to:

1. Failure to make payments to the sucontractors etc.
2. Substantial violation of a provision of the Contract Documents.
3. Failure to sully enough proper skilled workmen.
4. Not adhering to provision of Article 15.2.0.
5. Violation of local ordinances.

Very truly yours,

McNamara re-New-cars, Inc.
President.

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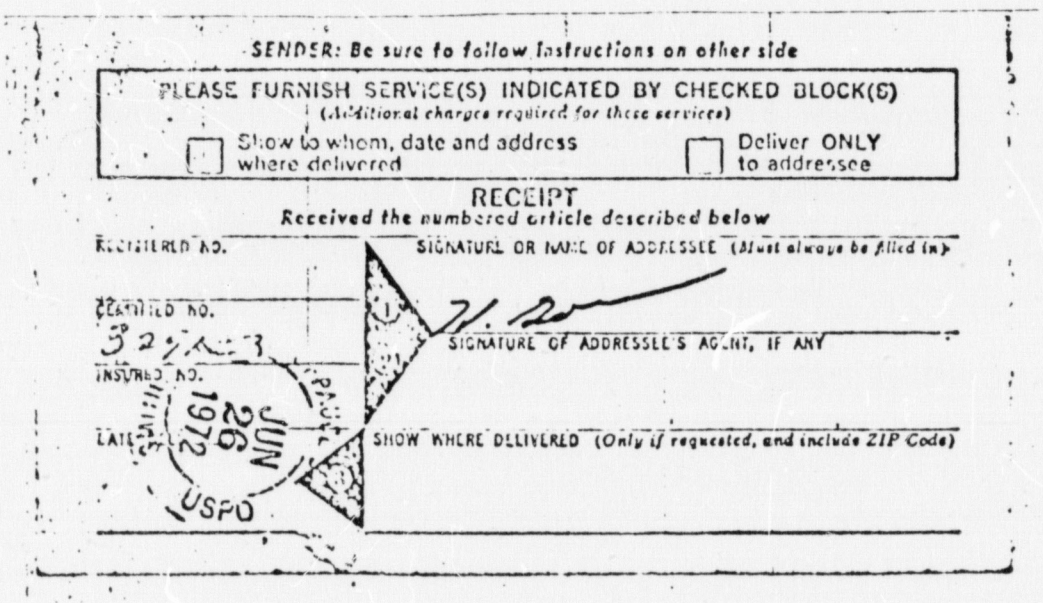
Exhibit D



SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)

☐ Show to whom, date and address where delivered

☐ Deliver ONLY to addressee

RECEIPT
Received the numbered article described below

REGISTERED NO.

CERTIFIED NO.

INSURED NO.

DATE

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

SHOW WHERE DELIVERED (Only if requested, and include ZIP Code)

JUN 26 1972
USPO

ONLY COPY AVAILABLE

Exhibit E

[Defendant McNamara's Exhibit D in Evidence]

NOTICE

THIS STRUCTURE OR PREMISES
VIOLATES THE FOLLOWING LAW

( ) ZONING ORDINANCE
(X) STATE BUILDING CODE
( ) OTHER LAWS

( ) HOUSING ORDINANCE
( ) MULTIPLE RESIDENCE LAW

ARTICLE 3 SECTION C-301 PARAGRAPH 4

DO NOT CONTINUE WITH CONSTRUCTION OR
USE OF PREMISES UNDER PENALTY OF FINE
AND IMPRISONMENT OR BOTH

TOWN OF BROOKHAVEN BUILDING DEPARTMENT

INSPECTOR

[Affidavit of Service by Mail]

Transcript of Proceedings

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	
-against-	:	73-CR-442
JOHN DeLISO, JOHN McNAMARA, THOMAS McNAMARA, ALPHONSE MEROLLA and ALPHONSE MEROLLA,	:	73-CR-1066
Defendants.	:	

----------x

United States Courthouse
Brooklyn, New York

September 20, 1974
4:30 o'clock p.m.

B e f o r e:

HONORABLE JOHN F. DOOLING, JR., U.S.D.J.

GENE RUDOLPH
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.,
United States Attorney
for the Eastern District of New York

BY: DAVID T. RITCHIE, ESQ.,
Assistant United States Attorney

MICHAEL J. GILLEN, ESQ.,
Attorney for defendant John McNamara

LEONARD T. MEISELMAN, ESQ.,
Attorney for Thomas McNamara
170 Old Country Road
Mineola, New York 11501

JOHN LEONE, ESQ.,
Attorney for defendant Merolla

MARIAN SELTZER, ESQ.,
Attorney for defendant Merolla

MR. GILLEN: Good afternoon, your Honor. 3

MR. RITCHIE: Good afternoon, your Honor.

THE COURT: Good afternoon.

All right, Mr. Gillen.

MR. GILLEN: Yes, sir. Your Honor, I'm covering this afternoon for Mr. Fischetti.

THE COURT: And for Mr. Leone?

MR. GILLEN: Mr. Leone, I think, will be here. I have spoken to Mr. Leone about an hour ago and --

THE COURT: I thought we had got a last minute message that he would ask you to cover for him?

MR. GILLEN: Fine. Then I will do so, your Honor. In fact, I had expected him in my office.

THE COURT: I think so.

MR. GILLEN: Okay. Fine.

THE COURT: All right, sir.

MR. GILLEN: Preliminarily, your Honor, your Honor had granted the -- Miss Tomaselli's Grand Jury minutes and they have been supplied by Mr. Ritchie.

However, in a letter written by Mr. Ritchie, he says: "In compliance with the order of September 16, 1974 and reliance upon the likelihood of Miss Tomaselli's being called as a witness by either the U. S. or a defendant, attached please find a copy of the Grand Jury minutes."

THE COURT: Yes. That was in -- if you will

think of the terms of my order, that makes sense.

MR. GILLEN: Fine. But I just want to bring up to the Court, I had represented in open court on a number of occasions that I had intended to call Miss Tomaselli. I do. I did call her in the first instance. But I don't think it would be proper for the Government to call her on their direct case.

THE COURT: Why not?

MR. GILLEN: Well, quite frankly, I have read these minutes and it's 66 pages and --

THE COURT: Oh, I know it.

MR. GILLEN: Yes. Fine.

THE COURT: I read them, too.

MR. GILLEN: I know that, sir. But what's happened here, I don't know whether the Government's going to take a defense witness, trying to use her on their direct case and have her declared as a hostile witness to a jury to create some aura of suspicion of her testimony.

I think that would be grossly unfair.

THE COURT: That's too --

MR. GILLEN: To create an aura of suspicion surrounding her testimony. I think it would be grossly unfair. She was called in the first instance--

THE COURT: I think that all that you -- you

see, the -- an examination of Miss Moraselli's testimony at the earlier trial indicates that she was called, I think, by Mr. John M. Namara.

MR. GILLEN: Yes, sir.

THE COURT: Essentially to testify that -- as to her observation of the physical condition of Mr. Goberman on either the 28th of June or the 5th of June. I forget.

MR. RITCHIE: 5th of June.

THE COURT: Perhaps both dates, but specifically, I think, the 28th of June. And as I recall, substantially, that's all that you asked her to testify to.

MR. GILLEN: That may be correct.

MR. RITCHIE: Your Honor, I believe what happened was that Mr. Gillen questioned her concerning the 28th of June and then Mr. Hoey brought up the 5th of June.

THE COURT: Then Mr. Hoey was interested in proving something else, which actually he never followed through on, the stock certificate book and the question of stock ownership, I believe.

MR. RITCHIE: Yes, your Honor. And also, he -- I believe it was he who questioned her about the 5th of June, the condition of Mr. Goberman on the 5th of

June.

THE COURT: Perhaps so. But in any event, Mr. Pollack, without objection, called -- I mean, examined her about the circumstances of the execution of the two instruments, as I recall it.

So that you could -- I mean, reading her trial testimony would be a little difficult to say at the end whose witness she was.

She was your witness, certainly, a defense witness, for the purpose of showing that, to the extent that her testimony could, that there was no evidence of physical abuse exhibited by Mr. Goberman's person, and some other things. And that Mr. Pollack had used her for the purpose of showing something more about the circumstances of the transfer of the trailer? No. The execution of that strange, was it, MV 51 form? And the execution of the contract release.

Now, I think most of this Grand Jury testimony has been further on those topics that Mr. Pollack opened with her. Don't you agree?

MR. GILLEN: Except, your Honor, this Grand Jury testimony, most respectfully, is the result of a badgering of a young girl in the secret atmosphere of the Grand Jury.

And honestly, what was done here -- what's the

color of her pants, what's the color of somebody else's pants, how many buttons on the blouse. We have an instance here, page 33 where this girl says, "I saw this fellow sign on June 5th."

"How do you know you saw him sign?"

"Well, I saw him with my eyes."

"How do you know you saw him?"

Over and over again.

THE COURT: Just stay with that. Now, what I think you'll find there, because I believe if you go on a little bit, she was -- I mean, Mr. Ritchie, as I recall, said to her, "Now, do be careful what you say. Do you really remember seeing him sign it?"

She said, "No."

MR. GILLEN: She didn't say no, your Honor.

THE COURT: I think at one point she did and then a little later she came back to testifying in the vein that was assuming that she saw it.

I didn't check back through the rest of the record because I don't remember what the testimony was about. the MV51 and I frankly couldn't tell whether Mr. Ritchie was warning her of saying something that other evidence indicated couldn't have been so.

In other words, that possibly her role was limited to locating and giving them the MV51 form which was then dealt with by others elsewhere because

not her name but the notary's name appeared on it.

She wasn't a witness of course -- a witness of record on either of these documents. Now, I think it would be fair to say that a good deal of Mr. Ritchie's testimony -- examination was addressed to emphasizing circumstances which would seem to make it rather unlikely that she would have been called in there at all.

MR. GILLEN: Called in where, your Honor?

THE COURT: To James McNamara's office down the hall.

MR. GILLEN: I disagree, your Honor. You are looking at it from -- of course, the Court's viewpoint.

THE COURT: No. All I'm saying is this: A witness doesn't belong to either side.

MR. GILLEN: No, sir. I know that.

THE COURT: A witness belongs to the truth.

MR. GILLEN: Yes.

THE COURT: And can be called by anyone interested in adducing the truth.

MR. GILLEN: I agree with that, sir. But what I say what happened here, for instance, at page 33, line 21:

"Question: You don't know whether you saw him

on June 5th or not. Is that correct?

"Answer: I guess I have to say yes. I'm sure he was there and I'm sure I saw -- but now I'm afraid to say anything because if he wasn't there, then you are going to say how come you said you saw him. He says he wasn't there. I know he had to be there that day when he signed that. Whether I watched him sign it or --" then he breaks in.

THE COURT: That's the big thing. That's the big thing,"whether I watched him sign I, I can't say."

MR. GILLEN: But this is after 34 pages. As a matter of fact, if that's so, this is after -- this is the page 33 and 34 -- after the same thing over and over. That would not be permitted in the court.

THE COURT: That's why I gave you the minutes, because I thought in the circumstances it was proper that you should have them, if she was going to be a witness.

MR. GILLEN: I appreciate that, your Honor.

THE COURT: But that's all.

MR. GILLEN: What I am saying --

THE COURT: I cannot say to Mr. Ritchie, "Don't you call her." You are saying, in effect,

will you rule now that he may not examine her as if she were an adverse witness.

MR. GILLEN: Or a hostile.

THE COURT: My answer to that would be, "Well, the witness certainly isn't adverse now. I don't hear her being adverse. The first time she is adverse, she may be examined as such. But she does not take the stand with any presumption of her nostility or of her being an adverse witness.

MR. GILLEN: I most respectfully submit, your Honor, that in the context of the whole case, in the context of the first trial, Miss Tomaselli's position and in the context of the Gran Jury interrogation --

THE COURT: I think you have made your point.

MR. GILLEN: Yes, sir.

THE COURT: If your point is that you wishto in effect get a ruling that the Government is not free to call her as a witness on its case in chief, I decline so to rule and you may have your exception.

MR. GILLEN: I make one further motion, your Honor, and I would move to dismiss this indictment on the grounds that the Government has interfered with the defense to the extent that it has called Miss Tomaselli into a Grand Jury knowing full well she was a defense witness in the first case and havir every reason to believe she would be a defense witne:

in the second case. And that because of the 66 pages that the Government has affirmatively tampered with the integrity of the process of the Court and with the integrity of a witness.

I most respectfully, and I make that motion in all sincerity, sir, because I don't think the Government should be permitted to do this.

THE COURT: Have you any cases on that?

MR. GILLEN: No, sir.

What I do have is just the whole history of fairness of the courts.

THE COURT: No. Have you any authority?

MR. GILLEN: No, sir. Because I've never known of this happening before. We are talking about a particular case in a particular court.

THE COURT: That is right.

MR. GILLEN: And a particular set of facts.

THE COURT: That is right.

MR. GILLEN: I most respectfully submit that this is tampering with a defendant's rights.

THE COURT: All I want to know is, have you any authorities at this point?

MR. GILLEN: No, sir, I do not.

THE COURT: And have you ever heard of anything like this? Because after all there are 50 states.

Must have happened somewhere, sometime.

R. GILLEN: Probably did. Maybe the Court dismissed the indictment so it never went up on appeal and that's the end of it and it is not reported. That could be the reason for this type of thing.

THE COURT: If it was dismissed before trial it could go up on appeal.

MR. GILLEN: That is right.

That's what I'm saying. But I've never heard of this happening before. This is grabbing a witness and doing this. With no reason.

THE COURT: How about looking in the books for me?

MR. GILLEN: I will. I will.

THE COURT: All right.

MR. GILLEN: I will.

MR. MEISELMAN: Your Honor, may I respectfully join in Mr. Gillen's motion?

THE COURT: Yes. All motions are -- unless other defense counsel ask not to be associated with the motion, they are assumed to have joined in the motion.

MR. MEISELMAN: And may I go further in this respect? In the event that the Court does not grant Mr. Gillen's motion to dismiss the indictment on the

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ground that the prosecution has tampered with the integrity of the defense, then I ask that the minutes of the Grand Jury concerning Miss Tomaselli be suppressed, for the reason that it was illegally and improperly obtained.

I think all of us are -- sufficiently long at the Bar, your Honor.

THE COURT: You move now to , in effect, prevent Mr. Ritchie from using the Grand Jury testimony of Miss Tomaselli?

MR. MEISELMAN: That's correct, cir, on these grounds.

THE COURT: In examining or cross-examining her as a witness?

MR. MEISELMAN: That is correct, sir.

THE COURT: Is that your motion?

MR. MEISELMAN: Yes. I would say, sir.

THE COURT: Is there anyone else who wishes to -- anyone who wishes to disclaim that motion?

MR. GILLEN: No, sir. We all join in the motions. Mr. Leone is here, your Honor.

MS. SELTZER: Excuse me, your Honor. I haven't been given a copy of those minutes.

MR. RITCHIE: You'll receive a copy. A copy has been sent to you.

MS. SELTZER: I can't at the moment see why we

disclaim.

THE COURT: I can't hear you.

MS. SELTZER: I won't know why I would want to disclaim being part of that motion but I don't know what's in those minutes, in any event and I would like to receive a copy.

THE COURT: I think Mr. Ritchie said you'd get them.

MR. RITCHIE: They were sent out either -- they were sent out two days ago. They should be at your office by today, I would think.

THE COURT: Should be there.

MR. GILLEN: May times, your Honor, mail in Brooklyn can take three, four days. When you mail it out to the Island it only takes a day. I don't know why that happens.

THE COURT: All right.

Mr. Ritchie? I take it you do not assent to either view?

MR. RITCHIE: No, I don't, your Honor, for these reasons: With respect to the illegal obtaining of the evidence and the suppressability of the evidence, I would say this: She was properly summoned before a proper Grand Jury. It was a proper Grand Jury because it was investigating at that time

the offense that resulted in 73-CR-442 and as the Court was informed, immediately after the trial, and as the Court I'm sure is well aware, the Government was seeking the return of another indictment with respect to that transaction, was also concerned with possibility of subornation of perjury at the prior trial and it was questioning Miss Tomaselli with reference to that.

For that reason, it was a proper Grand Jury with proper investigative function.

Your Honor had commented in his memorandum and order that he didn't see a proper -- he didn't see the purpose and that was the purpose, your Honor.

MR. GILLEN: Then, your Honor, I would ask --

THE COURT: Is there any official document that initiates such an inquiry? You see, the reason I ask that is because, as I recall, the Grand Jury minutes are entitled with a specific name.

MR. RITCHIE: Your Honor, if you'll notice, to the right of the caption --

THE COURT: The box?

MR. RITCHIE: -- is a criminal folder number. That criminal number is 741240. The criminal -- that' a U. S. Attorney's internal --

THE COURT: Yes. I know that. That was my next

question.

MR. RITCHIE: The criminal complaint number in this case, your Honor, was 720213, that resulted in this indictment.

THE COURT: Is there some formal procedure that opens something up before such a -- an indictment -- such a Grand Jury testimony is taken?

MR. RITCHIE: No, your Honor. It's initiated with the subpoena and the drawing up of the U. S. Attorney's file, with the particular criminal complaint number.

MR. MEISELMAN: May I call your Honor's attention --

THE COURT: What does -- I mean, is there a file jacket opened or --

MR. RITCHIE: Yes, your Honor.

THE COURT: An index card prepared?

MR. RITCHIE: Yes, your Honor.

THE COURT: And does that indicate what the topic is and who the prospective defendants are?

MR. RITCHIE: Yes, your Honor.

THE COURT: And is that done beforehand?

MR. RITCHIE: It would have been done by this time for me to have a number or else it would have been done at that time.

THE COURT: Is that material available to be shown to counsel, to allay their fears?

MR. RITCHIE: Not at this time, your Honor, but I can make it available. It's in a closed filed. When I decided to continue with this indictment, I closed out that file.

THE COURT: But there is such a file on it that can be produced?

MR. RITCHIE: Yes, your Honor.

THE COURT: Could you send for it now?

MR. RITCHIE: I couldn't get it today. I could get it for Monday, your Honor.

MR. GILLEN: Fine. It's ten to 5:00, your Honor. I think the U. S. Attorney's office is open until 5:30 if my memory serves me correctly.

MR. RITCHIE: Most secretaries leave at 5:00 o'clock, your Honor. At least in my office.

THE COURT: On Friday, I think --

MR. MEISELMAN: I think it speaks for itself, your Honor, that the -- the captioned page of the proceeding before the Grand Jury although it has no index or docket number, has a caption of U. S. of American v. Thomas McNamara.

MR. RITCHIE: Quite correct.

MR. MEISELMAN: Which would lead me to believe

that it refers to Thomas McNamara.

MR. RITCHIE: Your Honor, it refers --

MR. MEISELMAN: And Thomas McNamara --

MR. RITCHIE: That Thomas McNamara who is sitting right over there.

MR. MEISELMAN: Thomas McNamara had already been indicted.

THE COURT: There's no question about that.

MR. MEISELMAN: He had not testified in the prior trial. So there is no question of perjury.

THE COURT: There is no question about that.

MR. RITCHIE: A subsidiary interest of mine was possible subornation of perjury by Mr. McNamara on Miss Tomaselli and that's -- the Government did not see a possibility of successful investigation with respect to that at this time.

MR. GILLEN: I might say there are two witnesses subpoenaed at that time. Another defense witness, Det. Gill, was also called.

MR. RITCHIE: Det. Gill, your Honor, was under subpoena by the U. S. in the original trial. The U.S. in the original trial in the exercise of its trial tactical discretion didn't choose to use Mr. Gill. I had never spoken with Mr. Gill until after that trial. I did not put him in the Grand Jury that day

because Miss Tomaselli did take a while and I didn't have available Grand Jury time. And rather than inconvenience him, I spoke with him in my office and I let him go home.

MR. GILLEN: Was he the subject of subornation, too, your Honor?

We have had a representation of subornation of perjury in this Court.

THE COURT: He has not given any representation of subornation of perjury. The argument is not advanced by saying any things that were not said by Mr. Ritchie.

MR. MEISELMAN: I can see, your Honor -- where--

THE COURT: Mr. Ritchie, I think you said something else connected withthe indictment in 73-CR-442?

MR. RITCHIE: Your Honor, the primary interest of the Government at that time was to return a superseding indictment. Your Honor, himself, expressed some dissatisfaction with the vehicle used to bring this case before the Court. A 1951 conspiracy indictment.

You had thought it was a cumbersome way to proceed. I considered returning an indictment to include either one substantive Hobbs Act violation; two substantive plus the conspiracy Hobbs Act

violations; two substantive plus the conspiracy Hobbs violation, plus a Rico count, under 18 U.S. Code, 1962.

From my own reasons, I chose to proceed with the old indictment. After giving it much thought and after speaking with a number of individuals about the particular form for the indictment. There is a number of crimes that were stated that have not been charged. And we will proceed with this indictment to its conclusion and its conclusion will be the conclusion of that particular transaction.

MR. GILLEN: Is Mr. Ritchie saying we're going to have a fractionalized prosecution here?

MR. RITCHIE: That's precisely what I did not say. Just this moment, your Honor.

THE COURT: Saying that the only -- only put a man in jail once.

MR. GILLEN: Or not at all.

THE COURT: Or not at all. And that if his assertions of fact or the Grand Jury's allegations of fact are proved, they will prove the offense of this statute which will suffice to the day.

Is that it?

MR. RITCHIE: Yes, your Honor.

THE COURT: All right.

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Now, the motion to suppress and a -- and the argument is that the use of this testimony in evidence by you, either on examination or cross-examination, should be prevented by an order in the nature of a suppression order.

What do you say to that?

MR. RITCHIE: Your Honor, I don't know why -- why even if -- even if the worse that's been assumed were prove, that that testimony should be suppressed. I don't think there is any legal support for that and I don't think there is any -- any real justification for it whatsoever.

I don't think there is any legal authority for the suppression of evidence garnered in that manner. Certainly not in violation of anybody's Fourth Amendment rights. She was subpoenaed.

THE COURT: I suppose if anyone's rights, it would be Miss Tomaselli's right.

MR. RITCHIE: That is correct, your Honor.

MR. GILLEN: Not in the totality of the circumstances here. Not in the totality of circumstances here, your Honor. That would be so if it was just -- we were just talking about Miss Tomaselli. We wouldn't have standing to argue on a motion to suppress. But we're saying the totality of the

circumstances here gives us standing to make the argument. I make the motion to suprress.

MR. MEISELMAN: Otherwise, your Honor.

THE COURT: The fact that she was examined as a witness before the Grand Jury. That's the totality of the circumstances.

MR. GILLEN: No. She was also a defense witness and it was stated -- and intended she would continue.

THE COURT: She was a witness called by the defense.

MR. GILLEN: That is correct.

MR. MEISELMAN: Also a witness that the prosecution undoubtedly knew would again be called.

Now, they took, in effect, your Honor, a pre-trial deposition. Now, if they knew of other witnesses they could -- if unhindered, also take pre-trial depositions there.

I need not advise this Court the function of a Grand Jury. It is not to take a pre-trial deposition.

THE COURT: I think in the light of my memory, perhaps it is needless, yes. All right, then nobody has any cases, on either side?

MR. RITCHIE: Your Honor, I wasn't prepared to argue this. I wasn't aware of the motion.

THE COURT: Excuse me?

MR. RITCHIE: I wasn't prepared to argue this. I wasn't aware of any motion.

THE COURT: They hadn't had a chance to read it yet. They weren't really prepared to argue it either so this is a standoff then.

MR. RITCHIE: Yes, your Honor.

THE COURT: All right. Then if anybody has any authority to submit on either side of the point, I would appreciate sending it in, their sending it in.

All right. Now, to the business of the day, which is your motion, sir.

MR. MEISELMAN: Yes, sir.

Your Honor, I am addressing this motion to the lack of jurisdiction of the Court with respect to a prosecution under the Hobbs Act because of the lack of affectation of structure, hinderance or delay with respect to the requirement of the Hobbs Act concerning interstate commerce, with respect to and under a rule 12 (b)1 and,secondly, under Rule 6(e) for an examination of the Grand Jury minutes.

The facts upon which I base this motion are relatively simple. I need not bore the Court with a recitation of the origin of those facts. The contract for the construction of the building, entering into the

construction and so on. Suffice it to say, that there come a time on June 21, 1972, when the authorities in the person of the Town of Brookhaven in Suffolk County issued an order placing a violation upon these premises and ordering any and all persons to cease and desist for entering upon or using the said premises.

I have affixed a copy of such posting to the moving papers. I would at this time, if your Honor please, like to exhibit to the Court the posting of the premises themselves.

(Showing to the Court.)

MR. WEISELMAN: On June 24, by certified mail, a letter of termination of the contract under paragraph 14.2.1 was mailed ot Harry Goberman at Harmac and it was receipted by him on June 26th.

I have discussed this matter with Mr. Ritchie before this argument and he advises me that in substance he doesn't argue or challenge these facts. Indeed, in his answering affidavit, he in effect, bolsters the facts by advising the Court that at the time -- that in December of 1972, before Mr. Klein's appearance before the Grand Jury, he was made aware by Mr. Klein that the Town of Brookhaven Building Department had placed such a violation upon the premises and had banned further construction thereof.

It is interesting to note that this is not a violation as Mr. Ritchie seems to infer in his affidavit which requires a receivership. I think the word receivership should be in quotes. It was a violation with respect to part 3, section C-3, paragraph A of the New York State Building Code and I have here an official copy of the building code, your Honor, and it is where the building is unsafe because they cannot safely sustain their weight and it was for hat reason that the Town of Brookhaven posted the structure against further continuance and advised any and all persons by the public posting that to enter upon or continue with the construction of the building would make them liable to a fine or imprisonment or both.

At that point in time, your Honor, the construction was interdicted by force of law and having been so interdicted, the contract was terminated.

Now, it could possibly be argued that it was only a temporary termination and that at such time as the building was made safe, then the contract could continue.

Well, first the building was not made safe for quite a period of time after that, but the cases do hold that the interdiction does prevent it and

certainly the building was in no way, that is, its condition of safety was in no way changed between June 21 and June 28, the definitive date when the act of violence or extortion is alleged in the Bill of Particulars.

In addition, the contract was effectively terminated by McNamara Re-New Cars by a writing, terminating that contract, received by Harold Goberman at Harmac and effectively and effectually terminating the relationship between them.

Assuming arguendo, your Honor, that the contract was improperly terminated, that, of course, would give rise perhaps, if the parties so desired, to civil litigation between them for damages for breach of contract. But it,nevertheless,effectively terminated the contract.

The contract having been terminated, the relationship of the parties was severed, and therefore, even -- and not admitting it, your Honor, but assuming for the sake of argument, that the events of June 28th were extortionate or violent or wrongful in any way, they may have been if so done by the defendant Thomas McNamara alone or in concert with others,wrongful under State statutes.

It was not a violation of the Hobbs Act since

the contract having been interdicted both by termination and by operation of law, there was no way that interstate commerce could or would be affected thereafter.

I need not reiterate at this time, your Honor, the cases cited in my brief. They are sparse, but again I don't think,your Honor, that this point has been very much covered in the past. And I respectfully submit that on that ground, the Court lacks jurisdiction to prosecute this matter under the Hobbs Act.

Now, turning our attention, your Honor, to the fact that the Grand Jury either knew or did not know of these facts, it is the function of the prosecutor, your Honor, I believe, to have produced before the Grand Jury evidence of both the termination and of the violation and posting of the premises by the Town of Brookhaven. That they knew of such termination is evident from the fact that at the trial of the previous action, Mr. Ritchie alleged that he knew about the June 24th letter.

In his affidavit, he acknowledged that he knew about the violation because he had interviewed the official representing the Town of Brookhaven. We do not know if those facts were placed before the

Grand Jury. If they had been, I do not see, your Honor, how the Grand Jury could possibly have returned an indictment with respect to the events of June 28th and if they had, I think it would properly have been addressed by a motion to dismiss based upon the Grand Jury minutes.

If they had not been placed before the Grand Jury, then most certainly the evidence having been withheld, I respectfully urge this Court and suggest that the indictment should be dismissed, in any event. That is the defendant Thomas McNamara's argument, your Honor.

THE COURT: Mr. Ritchie?

MR. RITCHIE: Your Honor, with respect to the motion to dismiss the indictment, there are two pieces of evidence proffered, really, by Mr. Meiselman. One of the pieces of evidence proffered was the notice. The notice really doesn't say very much. My affidavit, I think, states better what actually happened.

What happened was that on June 20th there was an inspection of the building. On June 21st, the building --

THE COURT: Is that the one that related to the girder construction?

MR. RITCHIE: It had to do with -- Ieye beams

and steel joists. It is a little beyond my abilities, even after having had the assistance of Mr. McNamara's consulting architect, when I went out to the spot, after the last trial.

I'd like to note that despite the fact that that building was posted, I stood under those unsafe eye beams myself, just eight months ago.

THE COURT: That's sometime later.

MR. GILLEN: After the --

MR. RITCHIE: I am not arguing the merits of the contract case now. I'd like to note --

THE COURT: No.

MR. RITCHIE: -- that with respect to the argument on force of law --

THE COURT: No. I think what we have to deal with here is the fact that whether or not the termination notice was sent, the transaction of June 28th took effect. And Mr. Meiselman's argument is that at the time when the June 28th transaction took effect, there couldn't be any interference with interstate commerce because Mr. Goberman was out of the -- of any influence on commerce at all. Because he was off the job. He and Harmac were off the job.

MR. RITCHIE: Your Honor, the fact is that we have records of Mr. Tabee from the last trial; I think

your Honor may remember there was a lot of controversy over the daily records kept by Mr. Tabee. Mr. Tabee kept records of work done on the job site and admittedly after June 20th, that work became mere custodial work.

Yet, nevertheless, Mr. Goberman's employees were working there throughout the period until July 2nd or so. I'd submit that the posting of the job --

THE COURT: No. I don't think the notice -- the Town's notice of termination has anything to do with the case. I mean, I would -- I have some familiarity with unsafe building orders and things of that sort and they always mean that you have to take the property down to the ground, unless the condition pointed out in the underlying report is remedied and remedied promptly. That's all they mean.

I don't think that this one meant anything different . I understand from the evidence of the case that ultimately the structure was completed. Not by Mr. Goberman or by Harmac but as I understand it, it was completed.

Is that right?

MR. RITCHIE: Yes, it was, your Honor.

THE COURT: And I take it, without first taking the building down to the ground?

MR. RITCHIE: Yes, your Honor.

THE COURT: So --

MR. RITCHIE: With respect to the notice of termination, first of all, I don't know whether that notice of termination was sufficient. I don't know whether there was a certification from the architect as required in the -- in the particular clause, 14.2.1. But at any rate --

THE COURT: Who was the architect?

MR. RITCHIE: The architect at that time was --

THE COURT: It was not Mr. Goberman, was it?

MR. RITCHIE: It was up in the air. There had been some back and forth between Mr. Goberman and Mr. McNamara with respect to who the architect should be. There had been one architect named in the contract, named Thaddeus Lemanski. He was named in the contract.

At that time and in the time immediately -- well, in the period immediately subsequent to the events of June 5th and prior to the events of June 28th, there had been some discussion between the two parties to the contract that Mr. Lemanski should no longer be the contract -- contractor.

I believe he submitted a resignation for reasons of ill health and that --

THE COURT: The architect?

MR. RITCHIE: -- a certain other individual, Louis T. Romeo, another consulting engineer, should be

the -- the architect within -- within the meaning of the contract.

Neither one of them were -- I am not even sure that there is a licensed architect, but neither one of them designates themselves as architects. They call themselves consulting engineers. But they were the architect or to be the architect under the terms of that A.I.H.N. or conditions.

But at any rate, that notice of termination was sent June 24th, 1972. It was received by Mr. Goberman on June 26th, 1972, as evidenced by a certified mail receipt that was introduced at the last trial and is part of the moving papers of Mr. Meiselman.

That notice of termination under the terms of the contract required seven days notice. So no earlier than June 24th plus seven, or July 1, could Mr. Goberman's employment have been terminated. So on June 28th, Mr. Goberman would have been employed. And he was in fact going down to the job site and he had employees on the job site throughout that period of time.

THE COURT: I had the impression from the evidence at the first trial that the cessation of work was not unconnected with the fact of no money, rather than acknowledgment of the termination of right

to complete.

Is that right?

MR. RITCHIE: Well, that's the contention -- I believe that there was a -- there was more than just a building notice posting. I think there was a -- as your Honor is well aware, there was a lot of in-fighting and I do believe that Mr. Goberman contends that one of the reasons that the job was slowed down was because he didn't have the money to proceed.

I am -- I don't want to litigate that point in this trial.

THE COURT: As I understand it, from the landowner's point of view, the reason for no money was that no performance and no evidence of the application of previously paid money on payrolls and material bills and the rest of it -- in other words, they felt that monies previously paid had been diverted from the completion of the contract. Something like that.

Is that right?

MR. RITCHIE: There was a claim by Mr. McNamara that Mr. Goberman had not paid his subcontractors.

THE COURT: Yes. Or the -- maybe the payroll. Not the subcontractors. So that the whole thing was a mess. But I take it that the whole point of June 28th transaction was to make a reality out of the notice

of termination.

MR. RITCHIE: I believe so, your Honor.

THE COURT: In other words, to get him off the contract.

MR. RITCHIE: That is correct, your Honor.

THE COURT: So I think what -- what we are concerned with is not whether the notice of termination was sent, that had not been denied. It is not -- the last I heard of it admitted that it was sent properly, because I suppose the civil litigation is still going on, somewhere or other. So that it was not a self-executing act.

Mr. McNamara's firm and counsel apparently shared that view, since that was the purpose of the squaring off on June 28th. Was to try to get Mr. Goberman off the contract and that's where the alleged violation of law or this item in the alleged violation of law came to pass, the use of -- alleged use of force and violence at that time, to bring about an effective termination of Mr. Goberman's connection with the work.

Is that it?

MR. RITCHIE: Well, that's the Government's contention, yes, your Honor.

THE COURT: And I believe that Mr. Pollack and

you had introduced evidence to that effect at the first trial?

MR. RITCHIE: Your Honor, a contract release which the Government alleges was extorted from Mr. Goberman by force and violence was entered into evidence.

THE COURT: With an effect on commerce?

MR. RITCHIE: Yes, your Honor. I believe that that is -- that that establishes --

THE COURT: What I was interested in was whether, in the light of such a case as Maze, we had proximate enough connection with commerce here. That's all I was interested in, because I don't think I can accept now anymore than I accepted in the memorandum of June 18, 1973, the termination theory.

I was concerned with whether -- you see, the statute we're dealing with sounds so different from the case that we are talking about and the cases that have allowed its rather extended use have dealt with transactions that seemd so far from the language of the statute that I am concerned because I thought that Maze indicated a dissatisfaction with latitudinarian views of how much commerce will do and you remember that, as a result of Maze, such a conviction as Leon Osher's conviction was just abandoned. And he was

back in our court instead of being in prison.

See, here we are talking about --"Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce by robbery or extortion or conspiracy so to do or commits or threatens physical violence, in furtherance of a plan to do anything in violation of this section, shall be fined or imprisoned or both."

That is what I am concerned about. You see, here there isn't any question, I think, that as you point out Harmac had to acquire in interstate commerce the materials that it was going to incorporate into the new -- whatever you call it, distributor installation, the new --

MR. MEISELMAN: New structure.

THE COURT: And there isn't any question either that when that building was completed, it would house automobiles shipped in interstate commerce, for the most part. I think there was some indication that maybe there has been a new car that has come from somewhere in New York, but no one could really think of one.

It was all what, Rhode Island, Delaware and Detroit and what-have-you. But none of the particular acts that we are concerned with here was directed to

obstructing or delaying commerce. Affect commerce? Well, yes, but in the sense that only that it would have prevented Mr. Goberman and Harmac from continuing to complete the construction of this building, and I think the only evidence that we had at the trial was that most of the material was already here in the state.

MR. RITCHIE: That is correct, your Honor.

THE COURT: And that it was held up at various places, some of it was at the job site, but as yet uninstalled.

MR. RITCHIE: Yes, your Honor.

THE COURT: And some of it was being held by the suppliers over a matter of money and had not yet been delivered to the job and was later on delivered to the job but after Harmac was off the job.

That's as I recall the evidence. Then, on the other aspect, everybody seemed agreed that once the new installation was completed, it was everyone's anticipation and fortunately borne out, apparently, that more automobiles would be shipped to this new location than ever were shipped to the one in downtown -- was it Port Jefferson?

MR. MEISELMAN: That's the town, your Honor. Port Jefferson is the town, yes.

THE COURT: Port Jefferson, or the village, whatever. But that was about all. That's what I was concerned with, whether that's a -- whether that's good enough or whether you have to show something more closely connected with a flow of commerce than that and some obstruction more immediate than getting a man to sign off a contract or sign over a trailer.

MR. RITCHIE: Your Honor, I'd submit that there need be no greater showing, for these reasons: The Hobbs Act, as its very language makes clear, is designed to protect commerce from extortion and robbery I'd submit that there is an effect upon commerce when an individual or corporate entity engaged in commerce is taken out of commerce by an act of extortion. When he's taken off of the job he's taken out of commerce in this instance and when he's taken out of commerce by extortion I submit that there is a violation of the Hobbs Act.

The Hobbs Act states that it need not be a great effect on interstate commerce. It can be an effect in any way or degree. And I think **Varlach** makes it clear, the language in U.S. v. **Varlach**, 225 Fed. 2nd, 665, -- I don't have the exact page cite, your Honor, -- sSecond Circuit, 1955, language in **Varlach** makes it quite clear that the Congress in framing the

the original antiracketeering statute and in framing the successor statute, what's been commonly known as the Hobbs Act and incorporated in the U. S. Code as 18 U.S. Code, 1951, was designed to be the broadest use of the very great powers of the Congress, under the interstate commerce clause.

MR. MEISELMAN: With respect to labor racketeering and organized crime --

MR. RITCHIE: Your Honor --

MR. MEISELMAN: -- and has been later broadened by case statute, your Honor, not by the act itself. By case decision. But may I call your Honor's attention to certain facts which Mr. Ritchie has presented to the Court?

MR. RITCHIE: The argument of whether we are involved with organized crime or not.

MR. MEISELMAN: I didn't go into that argument at all. The history of the statute has to do with organized crime and labor racketeering.

MR. RITCHIE: The title is called the "Anti-Racketeering Statute" so it doesn't just have an effect on labor racketeers but --

MR. MEISELMAN: The legislative history shows that, your Honor. Is there any argument with that, Mr. Ritchie?

THE COURT: Please.

MR. RITCHIE: Absolutely not.

THE COURT: Please, Mr. Meiselamn, Mr. Ritchie was speaking.

MR. MEISELMAN: I'm sorry, sir, but Mr. Ritchie has raised some point --

THE COURT: He is speaking.

MR. MEISELMAN: I will wait until Mr. Ritchie finishes speaking.

MR. RITCHIE: I've lost where I was at. I'll let Mr. Meiselman go ahead.

MR. MEISELMAN: Mr. Ritchie has raised some point and I think your Honor has, too, concerning the architect and the fact that it was completed thereafter. And the question of notice. Has made allegations to the Court and I might make the same, in this sense: That Mr. Lemanski, who was the consulting engineer on this job,did not resign because of ill health. He resigned when it was discovered by Mr. McNamara that despite the fact that he was the consulting engineer for Mr. McNamara, he was the person from whom Mr. Goberman purchased the steel for the erection of this job and which steel was improper and so defective [illegible] caused a violation for unsafety to be placed against the building.

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MR. RITCHIE: Your Honor, I can only describe what I know.

MR. MEISELMAN: And I read from NYCRR 830, subdivision (a), which is the provision under which the Town of Brookhaven placed the violation on the premises. And it says: "Structural requirements: Buildings and parts thereof shall be capable of sustaining safely their own weight."

I've read only part of it. The rest --

THE COURT: You've read that to me before. I heard that.

MR. MEISELMAN: Yes. Mr. Lemanski resigned from the job. He would not --

THE COURT: On what date?

MR. MEISELMAN: Can you give us the date, Mr. McNamara? The 13th of June. Mr. Goberman would not consent to the person we chose to succeed him. If it would be the law that without his consent we could never, thereafter, have a supervising architect or consulting engineer, I don't think there would be proper law. We, thereafter, obtained the advice of a consulting engineer. It was found by him and by the Town of Brookhaven that the supporting beams were anchored into nothing and that the building was going to collapse unless something were placed under it to

it.. This effectively stopped construction on the job. I don't think there can be any argument with that, your Honor.

The question is when did it start again.

THE COURT: No. But there is, of course, because the argument is that that very condition being pointed out meant that there had to be ongoing construction to make the structures to which you point out, safe.

MR. MEISELMAN: And yet, Mr. Tabee in the previous trial, your Honor, testified that he was present there as a watchman. Because he had -- or at least my recollection of the testimony is that Goberman had received a notice of termination.

So that there is a double-edged attack, your Honor. First the termination by the town. And -- I'm sorry. The posting by the town and secondly, the termination of the contract itself.

THE COURT: I've already ruled onthat, Mr. Meiselman.

MR. MEISELMAN: I didn't -- if your Honor ruled, I -- I hope --

THE COURT: I ruled on it last June 18, of last year and I ruled on it again just a few minutes ago, that that part of it does not impress me. And

that what we are concerned with here is whether it was the use of force and violence to interfere with interstate commerce and not with the circumstance to which you refer.

The question of whether or not interstate commerce was going on could not be satisfied by simply showing that a notice of termination had been sent, particularly on the specific facts of this case where on June 28th, the last date with respect to which a violation is asserted or an overt act, call it what you will, is asserted, the very act complained of was one intimately rlated to getting Mr. Goberman and Harmac off the job.

MR. MEISELMAN: May I respectfully --

THE COURT: As I said before, and will not repeat again, the notice of termination was not self-executing and the defense -- defendant's McNamara demonstrated that by seeking the contract release on the terms, on the occasionand by the means on which it was sought, which is part of the gravamen of the indictment here.

MR. MEISELMAN: I would respectfully differ, your Honor, on the grounds --

THE COURT: Yes. You may do so.

MR. MEISELMAN: Yes.

THE COURT: All right.

But the argument on that aspect of the case is now over.

All right. Now, the other aspect of the case, the one to which I asked you to address yourself, Mr. Ritchie has dealt with. You say that you think that they were still sufficiently engaged in commerce on the 28th with respect to what? I don't follow.

MR. RITCHIE: Your Honor, he was the contractor on the job site.

THE COURT: Yes.

MR. RITCHIE: While it was temporarily halted he was nevertheless the contractor. At that time, there were materials on the job site that had not been erected that had been imported in interstate commerce.

THE COURT: You think that's enough?

MR. RITCHIE: Yes, your Honor.

I think especially in light of the case like U.S. v. Battaglia.

THE COURT: U. S. --

MR. RITCHIE: U.S. v. Battaglia. It was an Arizona case.

THE COURT: Do you remember the citation of it?

MR. RITCHIE: There are two fo them. One in

384 Fed. 2nd. There is another one in 393. They're both Hobbs Act cases. One is --

THE COURT: Battaglia?

MR. RITCHIE: Yes, your Honor.

THE COURT: B-a-t-t-a-g-l-i-a?

MR. RITCHIE: Yes, your Honor.

THE COURT: Something like that.

MR. RITCHIE: There are two Battaglia cases, both Hobbs Act cases. I am not sure of the citation of the one I am referring to now but at any rate, I believe it was the Arizona case, so it would be the Ninth or Tenth Circuit.

And that dealt with a --

THE COURT: What's that one?

MR. RITCHIE: It was Ninth or Tenth Circuit, your Honor.

THE COURT: What's the name of that one?

MR. RITCHIE: Battaglia. It's one of the -- there are two Battaglia cases that are important in Hobbs Act interstate commerce questions. I am not sure which of these I am referring to now, by citation, but it's the case that deals with a pool table which had been imported from, I believe -- well, at any rate, another state into, I believe, Arizona.

And Mr. Battaglia and his co-defendants, wishing

to place their own pool table in this particular bar threatened the -- the proprietor of the bar who also owned the table or rented the table, at any rate, and caused the green felt of the pool table to be slashed and I think they threatened to break the slate underneath the felt and that was held to be a sufficient effect on commerce.

I would submit that when we are talking about a $350,000 building, with numerous goods already imported of a rather expensive nature, including the steel joists and beams, when we are talking about goods imported in Nebraska, by Valmont Industries to Merkle Electric, for erection on this job site, still on the job site, still not erected, then I think we have a sufficient affect, more substantial, at any rate, than what was held a sufficient affect on commerce in the Battaglia case.

The -- I believe that in light of the whole line of cases concerning the interstate commerce clause, that have interpreted the interstate commerce clause to be very broad, from Wicker, v. Philburn up to the Katzenbach v. -- I think it was Hart of Atlanta Motel.

THE COURT: The which?

MR. RITCHIE: Katzenbach v. Maclum. The interstate commerce clause has been considered to be --

THE COURT: What's the citation of that?

MR. RITCHIE: I don't have the citation. I think it's 361 U.S.. I might be wrong. I hadn't been prepared to argue this. I'd just been prepared to take the Maze case which I would submit has nothing to do --

THE COURT: No. I told you that at the beginning. A mail fraud case. I am concerned with the Court's concern with latitudinarian interpretations of the commerce power.

MR. RITCHIE: Your Honor, I don't think that was raised at all in Maze.

THE COURT: Oh, all right.

MR. RITCHIE: It was purely a question of statutory construction, in Maze. Had to do with the specific intent.

THE COURT: Okay, then I don't have to be worried. All right. Okay. And what do you say, Mr. Meiselman?

MR. MEISELMAN: Your Honor, I was not aware of the Maze case until about 15 or 20 minutes before argument, when I received Mr. Ritchie's brief. And I -- not having read the case, I am not properly prepared to argue it before your Honor.

THE COURT: He says it doesn't have anything to do with the case.

MR. MEISELMAN: It would appear.

THE COURT: It's a mail fraud case. There isn't any question about that at all.

MR. RITCHIE: Your Honor, I am not saying that it has nothing to do with the issue at hand because it's a mail fraud case. I am saying it has nothing to do with the issue at hand because it doesn't deal with the question of the jurisdictional power of the U.S. under any clause of the Constitution.

In fact, in some dictum at the end, I believe it lends credence to my position. It lends support to my position. The Court did say there --

THE COURT: All right. Now, the next question then is, I gave you the charge that was used last time or at least my -- copies of my copy of the charge.

Now, what about the language with respect to commerce in that?

MR. MEISELMAN: I --

THE COURT: Assuming the evidence is the same.

MR. MEISELMAN: Are you addressing that to me, your Honor, or to Mr. Ritchie?

THE COURT: Everybody.

MR. RITCHIE: Your Honor, I hadn't received the copy of your charge.

THE COURT: Had any of you?

MR. MEISELMAN: I have, your Honor. Only in part.

THE COURT: I don't know why you didn't get it. I don't know why the Government should be discriminated against.

MR. RITCHIE: We're not entitled to a fair trial, your Honor.

THE COURT: By happy accident, I found a copy here. You had one at the trial, you know.

MR. RITCHIE: Yes, I know that, your Honor.

MR. MEISELMAN: I would, however, like to call the Court's attention, your Honor, to a sentence underscored on page 4 of Mr. Ritchie's brief cited from the Maze case, in which the emphasis was supplied by Mr. Ritchie to the words "... since the mailings in this case were not for that purpose."

The reason I raise that is again, and I sincerely trust I will not incur the wrath of the Court, is that if there was violence on June 28th, it was not with respect to the continuance or discontinuance of the job itself. If it was there at all, it was with respect to the discontinuance of the argument between the parties concerning their respective obligations to one another on the discontinued or terminated contract.

On that basis, there would be no affecting the

interstate commerce, because interstate commerce with respect to these parties had ceased.

The only dealings they had with one another was a confrontation or argument with respect to settling or disposing of their differences on their contract obligations.

THE COURT: I told you, I am not going to rule on the motion as you put it again.

MR. MEISELMAN: I thought it was my duty to rais this point before your Honor.

THE COURT: Yes, I understand that, to raise it clearly once and get it ruled on clearly once.

Anything else?

MR. MEISELMAN: I have nothing else to add at this time, your Honor. I would move for a dismissal on the indictment both with respect to the basis upon which I set forth in my moving papers and again, your Honor, as evidenced in argument upon the fact that there is nothing substantial, if I may use that word, visible with respect to the affecing, if any, of interstate commerce, irrespective of anything else. Because for all practical purposes, this job had stopped, whatever the reason may be, whether it be the order of the town, the interdiction of a president, the termination of the contract, the unwillingness to

copy of that. I'm sorry, when I said I did.

THE COURT: All right. Here is one.

MR. RITCHIE: I would request leave of the Court to submit a request to charge with respect to interstate commerce.

THE COURT: Yes.

Would you want to do that, as soon as you can?

MR. RITCHIE: Yes.

I'll do it as quickly as possible, your Honor.

THE COURT: The other thing is I think that the form in which the -- it has been done in other cases, is in effect to say to the jury, if you find such and such, then there is an affectation of commerce.

MR. RITCHIE: It's basically if you believe the facts adduced.

THE COURT: Yes.

MR. RITCHIE: That was the type of charge I was going to submit, your Honor.

THE COURT: In other words, apparently you are supposed to take any issue of interpretation away from the jury. Not give them any opportunity to say whether or not they think commerce was sufficiently affected.

MR. MEISELMAN: I do not know, your Honor, if it is proper for me at this moment, even before the trial

by any of the parties. It had come to an end. And the testimony of Mr. Goberman's own employee was that he was there as a watchman, or a custodian.

And that the materials had already in substance or substantially come to rest either upon the job or within the state and therefore, there was no further affection or affecting interstate commerce.

THE COURT: Affectation.

MR. MEISELMAN: I wasn't sure of the word.

THE COURT: I don't know.

MR. MEISELMAN: Affectation means something else.

THE COURT: It doesn't lend itself to being put into a better form. Okay.

MR. RITCHIE: Your Honor, with respect to the portion of the charge that concerns interstate commerce, the Government at the time of the first trial expressed the fact that it had no -- no disagreement with the substance of the charge. I do think, though, that through the course of the jury's deliberations, it's become apparent that the charge did at least cause to that jury some problems in comprehension.

And your Honor did further charge the jury and clarify the issue.

MR. MEISELMAN: Your Honor, I did not receive a

has started,to make any comments with respect to your Honor's charge at the last trial.

THE COURT: Oh, that's why it was sent out.

MR. MEISELMAN: But reading on page 12, where Mr. Ritchie has opened, I see an underscoring on the copy I -- that was given to me and I would have to respectfully differ with the Court and I think I have a case exactly in point, which I do not have with me because I am not prepared to argue the charge but I'd be glad to submit it to the Court.

THE COURT: You refer to what?

MR. MEISELMAN: I am now referring to -- starting on the fifth line on page 12, and referring to the shipment of cars after the building was to be constructed. There is a case and I have it in my notes at the office. I do not have it with me, and in which the Court held that even though sand, a shipment of sand in the erection of a mill was an interference with interstate commerce, the fact that that mill after it's erection would ship steel interstate was not interstate commerce.

MR. RITCHIE: Your Honor, that was U.S. v. Stirone.

THE COURT: What's the name?

MR. RITCHIE: U.S. v. Stirone.

R/rp

MR. MEISELMAN: I believe Mr. Ritchie is quite correct, sir.

MR. RITCHIE: The deciding factor in Stirone was a question -- of the sufficiency of the indictment as opposed to the evidence alleged -- testified -- adduced at the trial, concerning interstate commerce.

In the indictment the only allegation was that the -- the contractor, the affected party, was engaged in interstate commerce because he was receiving goods in interstate commerce for construction. But the proof adduced at trial and what was allowed by the charge of the Court was not only was he receiving goods, but the building he was building was going to end up shipping in interstate commerce.

So there is a variance between pleading and proof or there was a -- an insufficient appraisal of the defendants of the charge against him.

MR. MEISELMAN: It's four square on this case, your Honor.

THE COURT: What's the citation of that?

MR. MEISELMAN: Stirone against the U. S., I believe it is cited in my brief, your Honor, and Stirone against the U. S. is four square with the case before -- at bar at the present moment.

The indictment in this case, your Honor, alleged that there were articles shipped in interstate commerce for the construction of the building. Makes no reference to what that building would be used for thereafter.

MR. RITCHIE: I believe it does.

MR. MEISELMAN: If it does in such vague terms then it certainly doesn't apprise us and if that's the Government's position, I would move to dismiss on the ground of vagueness because we have not been apprised of the defense we have to raise.

And in the Stirone case, your Honor, I believe I have the citation.

THE COURT: Yes, 361 U. S.

MR. MEISELMAN: Yes, sir.

MR. RITCHIE: That may have been where I got Katzenbach v.McClum, your Honor. I can't give you a citation on that one.

THE COURT: You see, it says in Count One, "Was engaged in the construction and preparation of construction of a building on behalf of McNamara & McNamara Re-New Cars, Inc., which building was to be utilized in connection with the service and sale of new automobiles, parts of which were to be manufactured in other states and transported in interstate

commerce to the said building, and that for the purpose of performing the construction, Harmac transported, moved and cause."

So he did allege -- did rely upon both aspects of the interstate commerce. In other words, that if someone had come in and said to McNamara, Used Cars -- New Cars, "Don't build such a facility on the highway there because we don't want anymore goods being shipped in interstate commerce," that would be a Hobbs Act violation.

If it was enforced with guns and all the rest of it and no less so if it was deliberately -- a deliberate interference with a man's completion of a building --

MR. MEISELMAN: Except my reading of it, your Honor, and especially where the comma is, refers to the parts to be incorporated in the building.

THE COURT: It refers to --

MR. MEISELMAN: The --

THE COURT: -- to both.

MR. MEISELMAN: I cannot read it that way, your Honor.

THE COURT: "Which building was to be utilized in connection with the service and sale of new automobiles, parts of which were to be manufactured in

other states and transported in interstate commerce for said building."

That's one aspect.

"And that for the purpose of performing the building construction, Harmac transported," etc.

Don't ask me why he didn't say automobiles, but he just said automobile parts.

MR. MEISELMAN: I again respectfully differ with the Court. I don't read it that way.

THE COURT: I'm sorry. I have to read it the way it is written. And that's the way it is written.

MR. MEISELMAN: I respectfully differ. I think it is subject to interpretation.

THE COURT: You may differ. I disagree with you and I am the Judge. I rule. Clear?

MR. MEISELMAN: I accept your ruling, your Honor. I merely wish to show my difference on the record, for whatever it may be worth.

THE COURT: All right.

Anything further?

MR. MEISELMAN: I did not come prepared, your Honor, to discuss the charge at this date. If your Honor wishes me to be prepared at a later date, I certainly shall be.

THE COURT: How you represent your client is

your concern, Mr. Meiselman.

MR. MEISELMAN: I don't understand that, your Honor.

MS. SELTZER: Your Honor, I believe that when we received the charge in the mail, there was no explanation as to why it was being mailed to us.

THE COURT: No. We had discussed it before.

MS. SELTZER: I don't think I --

THE COURT: I had explained my concern with the whole interstate commerce question and told counsel that I wanted them to review the language of the charge with respect to commerce, both from the point of view of charge language and the underlying jurisdictional problem. That's why I made certain that you got copies of the charge.

Now, that of course doesn't mean that if you see something else wrong with the charge, you shouldn't draw that to my attention as well. But the specific reason for sending it to counsel was the one I have just expressed.

MR. RITCHIE: Your Honor, is it your Honor's intention to use the same charge the next time?

THE COURT: Not in the light of what has been said, and as you pointed out, and one of the reasons why I raised it and I think we raised it immediately at

the very end of the last trial, in view of the Jury's evident difficulty with the point, that we'd have to take a fresh whack at it.

MR. RITCHIE: I don't mean just in -- with respect to the interstate commerce clause but with respect to the entire charge.

THE COURT: Oh, no. Certainly not. But all counsel had the charge as always in this part of the Court in full text before it was given to the Jury.

MR. RITCHIE: That's correct, your Honor.

THE COURT: And I expect that I heard at that time counsels' thoughts on the charge.

Now, if counsel have further thoughts on the charge, of course, they owe it to their clients to bring them forward on both sides.

MR. RITCHIE: But my question is, your Honor, absent any further requests to charge, this is the charge your Honor intends to use and if we have any requests to charge, they might be frameable?

THE COURT: Having charged this before without -- I forget, I don't think there were any material exceptions to the charge, as I recall them.

MR. RITCHIE: I don't think so, your Honor.

THE COURT: I would not presume to revise it, because it was the product of discussion with counsel.

Now, I point out that we could look at the transcript. Have we got the part of the transcript? I'm not sure we have any part of the transcript after the Jury retired. Do we?

MR. RITCHIE: I don't believe we do. I haven't, your Honor.

THE COURT: I don't think anybody ever bothered to have that transcribed. I don't see why anyone should, do you? It was a mistrial.

But I think they -- the Jury certainly asked us questions about commerce, did they?

MR. LEONE: dYes, your Honor.

THE COURT: Did they ask questions about anything else, do you remember?

MR. LEONE: I don't recall but I specifically recall that they asked a question on the commerce part of the charge and your Honor gave a supplementary charge.

There were exceptions to that part of the charge.

MR. GILLEN: Supplementary charge, your Honor. I think your Honor used some words to the effect, "I don't want you members of the Jury to think I am shoving it down your throat, but I am." And that's what -- those were your Honor's words.

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MR. LEONE: That came out -- they came out sometime after they were in, where your Honor thought you had made his charge pretty clear and they asked that very question on commerce, and that's the way your Honor charged it.

THE COURT: Made it clear they had to take it?

MR. LEONE: I'm sorry.

THE COURT: And made it clear to them that they had to take it that way?

MR. LEONE: Yes.

MR. RITCHIE: They came out, I think, three times with questions on interstate commerce, your Honor. And it was filed -- finally resolved, I believe, at that point.

MR. LEONE: I don't think they came out three times. I recall coming out once on the question of commerce. I think there was some testimony read back or something to that effect.

THE COURT: Anyway, that's the sort -- that's the only reason why I have talked in terms of commerce.

Of course, if you don't like the charge, say so. That's the reason for my giving counsel the charge in advance of delivering it and as much in advance as I can, as everyone of us knows who has

ever tried a case in my Court.

Clear?

MR. RITCHIE: Yes.

MR. GILLEN: Yes,

MR. MEISELMAN: Yes, your Honor.

THE COURT: Okay.

MR. MEISELMAN: Do I take it then, your Honor, so I have it clear in my own mind, that your Honor has denied my motion?

THE COURT: On the ground on which you put it.

MR. MEISELMAN: Now, is there any reservation by your Honor as to a decision with respect to the amount of vidence with respect to interstate commerce?

THE COURT: Yes. I am still not wholly happy about it and if you people have any more authority, because I think that some of the cases under the Hobbs Act have been -- have been -- have attenuated the commerce connection dangerously.

I think particularly the one in the Third Circuit where they in effect said, "Well, if you took money from a man and he was engaged in commerce, that would affect the commerce because he wouldn't have enough money to pay for his next bill for shipment of goods in commerce, which seemed to me a little slender.

MR. GILLEN: That's the precise argument here on the $1,300.

THE COURT: Well, you can take the whole ball of wax, though, you see.

MR. GILLEN: No.

THE COURT: I think what Mr. Ritchie's fundamental point here has been, as he has put it up, and I think with great simplicity and clarity, is that Harmac couldn't have built this new automobile store without being engaged in commerce and that the flow of goods from these foreign supplies into the building on Nesconset Highway is essentially a flow of commerce. That when you use a blackjack on a man to get him out of the completion of such a contract, you have interfered with that flow of commerce; right?

MR. RITCHIE: Yes, your Honor.

THE COURT: That he says is what we say you did and what we say we proved you did the last time and we can't help what Juries do; is that it?

MR. RITCHIE: Well, I believe the Government did prove beyond a reasonable doubt.

THE COURT: That's where you and the Jury divided.

MR. RITCHIE: And I had most of them on my side, your Honor. At one point, all of them.

MR. GILLEN; No. I think it was evident that these two ladies --

THE COURT: We'll never know what the vote really was.

MR. GILLEN: It's a real world and that's the way it appeared.

THE COURT: All right. But we do have that -- did have that signal from them that they were finding a little hard to swallow the commerce connection.

MR. LEONE: That's right.

THE COURT: So they -- we either have to make it clear to them, clearer to them next time around, without being wrong about it.

MR. GILLEN: I think in effect, your Honor --

THE COURT: Or find out why they were right about it, if they were.

MR. GILLEN: I think what it was, your Honor, that it is such a tenuous connection here, and it has been aattenuated to the breaking point that 12 people with 600 years of experience on this earth, just couldn't see the Government's position. And that's precisely what it is.

MR. LEONE: Especially when there was testimony that in fact there was an improvement of commerce, or tht there was -- it affected commerce in

positive rather than in the negative, in the amount of automobiles that were sold, being greater etc.

I think to the layman it just -- it was hard to swallow, as your Honor said.

MR. GILLEN: Also that they wanted the building finished. That's all the people ever wanted.

MR. LEONE: To have the building finished.

MR. RITCHIE: Your Honor, we are dealing with the question of jurisdiction and I don't know how much Jury common sense really has to do with it.

We are talking about the powers of Congress, delegated through the Constitution and most Juries I would submit are not constitutional scholars.

MR. GILLEN: But they are the people. They are the people that vote for the congressmen that pass the laws. I think the people still have a say.

THE COURT: The trouble is that you have to prove an interference with commerce, and the only way we could get around the point, you see -- and this is perhaps what the cases are all but saying, is if the issue is in effect taken from the Jury, if there isn't any issue of fact about those facts, which, as a matter of law, make it commerce or don't.

Now, see, that was the real problem here.

Now, questions of act are supposed to go to

the trial.

The Government has to prove fact beyond a reasonable doubt. The Government undertook to prove the commerce. So I couldn't say to the Jury, "I suppose you've got to believe these men who came in and swore and showed their little pieces of paper to prove that materials had been shipped in from out of state and that they were actually shipped to this site and that they were either in the building fabric or at the site awaiting incorporation in the building fabric, or were in the local contractor's storage yard awaiting local transport to the site for incorporate into the building, and therefore, this is commerce, and take it away from the altogether. I couldn't do that.

Apparently, and yet, you have to come so very close to doing that that you might as well be taking it from the Jury. That's the conundrum in these cases, that really these facts are not particularly controverted to be sure you have to prove them. But the Government -- the defense wasn't trying to show that no materials came in in interstate commerce.

Of course, you can't resist the opportunity to cheer your fellow, show that the stuff was in his

lumber yard, not on the job or that it was delivered to the site days ago, that nothing more is coming.

All these things, where does it all end? That's what the -- what puzzles me and that's why I found the charge, the whole charge, so dreadfully unsatisfactory in this and I guess in almost every Hobbs case -- Hobbs Act case, that isn't a clearcut gut at the head case.

It's easy if you pick a man up just as he emerged from the Holland Tunnel with a load of k South Carolina cotton bound for Massachussetts and put a gun to his head, take his load off him. That's easy. That's the Hobbs Act.

MR. GILLEN: No. That's the 659, your Honor.

THE COURT: It's also 659.

MR. GILLEN: It's like the one that Mr. Goberman when he hijacked a truck.

THE COURT: Never mind that. But it's a Hobbs Act case, because it's direct interference with commerce.

Now, we are a long way from that. But as Mr. Meiselman pointed out, this all started off with labor racketeering.

Sure, a pseudonym was used for extortion and that's what they were after originally and that's when

they had -- why they had the terrible row over the interpretation of the first version of the Hobbs Act, and after the Supreme Court decision it had to be completely, in effect, completely rewritten so that it would work right. Because before that I think it had resulted in some terrible decision.

MR. RITCHIE: Resulted in a decision where unneeded, unwarranted and superfluous -- it resulted in a decision where unneeded, unwanted and superfluous work could be extorted and not violate the Anti-Racketeering Act in 1934.

THE COURT: Yes. But the suggestion was that it would be a violation of the Constitution to prevent it. I think -- was it Mr. Justice Stone who wrote it, wasn't it?

MR. RITCHIE: I don't know who wrote it.

THE COURT: It was really something. So the Congress put a stop to that. But that's a long way from this. Maybe.

That's all I'm concerned with. How to handle this darn issue because it is such a -- an unsatisfactory and difficult issue for us lawyers to deal with, with any sense that we're getting it squarely before the Jury in a way that it is proper that it be before the Jury.

Anybody has any bright ideas? I wish he'd march forward with them.

MR. LEONE: Judge, we did recognize it was a problem when that Jury came back in and asked for the very same instruction that you had given them.

I think you were a little bit more forceful. We disagreed with the supplementary charge.

THE COURT: I think you disagreed more than anyone else because you thought I was jamming it down their throats, just because I was.

MR. LEONE: Yes. We thought you were taking --

THE COURT: I thought I had to.

MR. LEONE: We understand the problem. But I don't know what the solution is. We have no objection to the charge as far as I know, to the way it appears now. But if there will be a supplemental charge, if your Honor is thinking along those lines of telling the Jury, then words to the effect that you must find that there was a -- then we might have some --

MR. GILLEN: We'd certainly object to that, your Honor, most certainly.

I think the problem arises, your Honor, from the facts of the case -- honestly, from the facts of the case.

THE COURT: No. I think it was because, you see, you had to put on this evidence of shipment in interstate commerce, all the rest of it, and that just never comes up with anything that looks like familiarity. It just gets so messy looking.

I think the Jury said, "Well, what is all this stuff, things being shipped in? It's a building contract. They didn't send a building in interstate commerce."

MR. LEONE: But I think -- I think personally that the -- the Jury might have had some problems with -- again I am repeating myself, but with the fact that -- well, if we had a case where the facts were that they blew up this building, see, and affected interstate commerce in that respect --

THE COURT: You had or had actually prevented him from picking it up off the railroad and moving it to the site.

MR. LEONE: What we had here as it developed was -- I am only surmising what might have been one of the problems, is that --

THE COURT: That's why I -- why I in my -- when I was still busy worrying about this and read Maze, see, I kept thinking of it in terms of, well, here you see, there, the two aspects of the thing were discreet.

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The getting of the night's lodging, whatever it was, was all over locally. But he knew, of course, that inseparably connected from what he was doing and this was part of the success of the scheme, was that they were going to have to go through a lot of accounting and mail things to distant places and get checks back by the mails and so forth, and so on. So that in a way, mail, distance and the delay implicit in all these things was part and parcel of being able successfully to perpetrate a credit card fraud on a hotel people, but whether it was a stolen card that had been revoked, whether it was forged, whatever it was, that the two transactions were separate, and one was so complete.

So, here, you see, what I was concerned with about was that all -- here everything up to a point because we had no evidence as it happened that still more things were going to have to be shipped in interstate commerce to complete the job, although you could assume that maybe there would be.

Everything was all there and this was just forcing a man to sign a piece of paper, get a night's lodging. Was it close enough? What was the real offense against the King's peace here? Did it have anything to do with commerce in any real sense or

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was the offense against the King's piece wringing this document to bring what they were not entitled out of a man by force and violence.

I say to which they are not entitled, I mean because they couldn't get it in that way, if what the Government's evidence said was true. They could only get it by negotiation. They couldn't get it with a rubber hose, and weren't negotiating. They were pounding their fists on the table and where necessary, on the top of his head to get it.

Now, was that interfering with commerce or are we likely to see some of this cutback now, because I think it has some -- I think one at least of the dissenting judges thought if the Maze case was right, what were they going to do with the Pereiro case that was supposed to be the bellweather case on mail fraud, or the use in interstate commerce, were really the same sort of thing, except that the check was drawn on a foreign bank or a bank in another state. So that inevitably the check was going to have to go through the mails and the dissenting judges said, "Brother, if you think you have distinguished that case, you have different authorities on the art of distinguishing than I have."

MR. RITCHIE: Your Honor, I'd just like to note

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that Justice Rhenquist said that the U. S. does have the power to punish that type of offense but that under the mail fraud statute, it hadn't done so but that it does have that power precisely under the interstate commerce clause. And in fact, under Title 15 U. S. Code Section 1655, with respect to certain credit card transactions, it's a monetary limit.

THE COURT: In other words, they were talking only about whether this could be prosecuted under 1341, because that's all it was -- was it 1341?

Well, whatever the mail -- the classic mail fraud statute is.

MR. RITCHIE: Yes, your Honor.

THE COURT: That's the only one they had prosecuted it under, though they could have done it, I guess, under other statutes.

I have forgotten now.

MR. MEISELMAN: What -- we are relegated to a question of fact, I believe. As to whether -- if the acts of June 28th, if there was violence and extortion, if there was this pounding that you referred to, was that pounding going to get --

THE COURT: That's his case.

MR. MEISELMAN: No. Assuming argument that took

place, assuming that, was that pounding to settle their contract differences which on a contract which had already terminated, or to terminate the contract?

I think that is a question of fact.

THE COURT: I will not rule on that again.

MS. SELTZER: Your Honor, excuse me.

In order for me to obtain the minutes which I think would be necessary during this proceeding, it is necessary for you to order or advise the Court reporters that it would be okay under the Criminal Justice Act for me or Mr. Merolla --

THE COURT: Isn't that terribly expensive? Can't you requisition them from the files?

MS. SELTZER: No. I am talking about the minutes of the proceedings to come, not the past proceedings.

THE COURT: You mean the next trial?

MS. SELTZER: Yes. I already have seen the minutes of the last trial. I have already seen the minutes, most of the minutes of the last trial.

It's just if -- it would be necessary for you to allow me to obtain the minutes.

THE COURT: You would have to fill out a regular form.

MRS. SELTZER: Thank you, your Honor.

THE COURT: If you can, do so.

MS. SELTZER: The Court reporters have been very nice in helping.

THE COURT: No. If the facts will permit you to.

MS. SELTZER: That's what I'm asking you at this time, whether you will allow for me to receive daily copy of the minutes during the course of the trial.

THE COURT: I am saying, representation, if they're still true.

MS. SELTZER: I understand that Mr. Merolla's financial situation has not changed since we were here last.

THE COURT: All right. We have to keep that in mind becuase if things begin looking up for you, Mr. Merolla --

DEFENDANT MEROLLA: You'll be the first one to know, your Honor.

MS. SELTZER: Thank you, your Honor.

MR. RITCHIE: Good night, your Honor.

* * * *

Memorandum and Order

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 CR 442

UNITED STATES OF AMERICA,

—against—

JOHN DE LISO, JOHN MCNAMARA, THOMAS MCNAMARA, ALPHONSE MEROLLA, ANGELO MEROLLA, ROCCO MEROLLA,

Defendants.

UNITED STATES OF AMERICA,

—against—

ALPHONSE MEROLLA AKA "FAT NICKY," "PENGUIN"

Defendant.

---

1. Defendant* Thomas McNamara moves to dismiss the indictment on the ground that the Court has no jurisdiction (contending that the construction contract had been terminated by notice given under Section 14.2 of the contract on June 24, 1972, and that the town had suspended work on the job by order posted on the job site on June 21, 1972, so that no "affect" on commerce, or on the movement of any articles in commerce, could have occurred on June 28, 1972) and moves also for an examination of the Grand Jury minutes.

On the ground made, the motion must be denied. The notice of June 24 could not by its sending and receipt terminate the contract. Even if production of the architect's certificate was excused, the most that McNamara re-New-Cars, Inc., could do by notification would be to assert its position, as the letter plainly did. It could not unilaterally establish its assertion as the legal right of the matter. The letter was not self-fulfilling or self-executing. Hence, the transaction of June 28 was addressed to getting HarMac to relinquish the job. For all that appears, the notice sent by McNamara re New Cars, Inc., could have been an unwarranted repudiation of contract duties that was a breach—and an element in a course of action that interfered with the HarMac performance.

The town's order was, it appears, a "hold" order, requiring correction of unsafe conditions before continuing construction.

The further question:

> whether, assuming that the construction contract itself was made in contemplation of, and if performed would have brought about, (a) the interstate delivery for local erection of substantial quantities of building materials, and (b) the utilization of the completed structure for the receipt, storage and resale of automotive parts manufactured and shipped from other states,
>
> would using violence to get from Goberman the $1,300, the trailer, and the contract release be acts sufficiently connected with that commerce to support the indictment under Section 1951?—

that is the question to which attention was invited. *United States* v. *Archer,* 2d Cir. 1973, 486 F.2d 670, 677-678,

cited by defendant's counsel, dealing with 18 U.S.C. § 1952, and *United States* v. *Maze,* 1974, 414 U.S. 395, 399, dealing with 18 U.S.C. § 1341, are both concerned with the question whether the activity furnishing the basis of federal jurisdiction (legislative or judicial) was sufficiently closely and fully connected with the alleged misconduct indicted to support the indictment. In *Archer* the inquiry was whether the interstate or foreign telephone calls were "of casual and incidental occurrence" or integral to the misconduct indicted; in *Maze* the question was whether or not the interstate mailing of bills in order to be paid by interstate remittance was merely a consequence or was an integral part of Maze's scheme of using a stolen credit card to get lodging at motels en route from Kentucky to California.

Here, the charge is conspiracy to obstruct, delay and affect commerce and the movement of articles in commerce by extortion, *i.e.,* by obtaining property with consent but consent to be induced by wrongful use of violence and threats of injury to person and property. The evidence is, in the main, that HarMac bought building materials from local suppliers who had it shipped in from out of state either to the job site or to their local storage yards, that most of the shipment was complete, but not the installation, and that, of course, the new facility would import vehicles and parts from other states for resale. The conspiracy was not aimed at commerce: no one conspired to hold up interstate shipments until HarMac was ready to release its contract rights, surrender its trailer, and pay over $1,300. In some sense what was done (if done as Mr. Goberman testified) did "affect" commerce, but affected it at one remove at least if not at the second

remove. Is that enough today? The thinking in *Maze* and *Archer* suggests that the decided cases under Section 1951 require serious re-examination.

While the commerce motion must be denied on the ground made, the broader commerce question remains open. The evidence may or may not help us on it.

In any event, as made clear at the hearing, requests to charge on the commerce point are welcome. Is the commerce point in this case, in light of the evidence, a pure question of law that we need not trouble the jurors with? If there are one or more convictions and an appeal, will a verdict that includes a theoretical resolution of commerce —fact questions be an advantage or an embarrassment? Should the commerce "facts" be stipulated to isolate the commerce issue where both sides can shoot at it on the law?

2. The motion of defendant John McNamara to dismiss the indictment for prosecutorial misconduct in allegedly tampering with the testimony of a witness who had been called as a defense witness and who could be expected to be called by the defense on re-trial is denied. Assuming that Miss Tomaselli was called in a new matter (# 741,240, but, still, violation of Section 1951), perhaps re-indictment to include the second Alphonse M. Merolla (not subornation of perjury, Section 1622), the evidence adduced through her does not seem appropriate. But, while calling Miss Tomaselli might be thought to have been inadvisable and to go to the very farthest border of the permissible, it does not amount in evident purpose or in probable effect to prejudicial misconduct. The motion is denied.

3. The motion of defendant* John McNamara to suppress the use of Miss Tomaselli's Grand Jury testimony at the re-trial is denied. The testimony cannot be effectively used unless to impeach, since Miss Tomaselli is not a defendant, and even if suppressed, would remain available under *Walder* v. *United States,* 1954, 347 U.S. 62, 65-66, and *Harris* v. *New York,* 1971, 401 U.S. 222.

4. It is suggested that if the Government calls Miss Tomaselli as a witness it be instructed not to examine her as a hostile adverse witness. The point is hypothetical, but, as in every case, whether a witness can be examined as adverse and hostile depends on what happens at the trial. No presumption that a witness is adverse and hostile flows from the fact of employment by a firm owned in whole or part by one or more defendants.

5. Defendant* Thomas McNamara moved to examine the Grand Jury minutes to determine whether or not the June 24 notification and the Town's posting of its order were facts presented to the jury, and, perhaps, for other purposes. The ground for disclosure of the Grand Jury minutes has been made out. The motion is denied.

It is so ORDERED.

Brooklyn, New York
September 27, 1974.

/s/ JOHN F. DOOLING, JR.
U.S.D.J.

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* All defendants have joined in all the motions.

Transcript of Proceedings

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

73-CR-442

JOHN DE LISO, JOHN MC NAMARA, THOMAS MC NAMARA, ALPHONSE MEROLLA and ALPHONSE M. MEROLLA,

Defendants.

----------x

United States Courthouse
Brooklyn, New York

October 7, 1974
10:00 o'clock A.M.

B e f o r e :

HONORABLE JOHN F. DOOLING, JR., U.S.D.J.

HENRY SHAPIRO
OFFICIAL COURT REPORTER

ONLY COPY AVAILABLE

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: DAVID RITCHIE, ESQ.
-and-
MARSHA KATZ, ESQ.
Special Attorneys, Task Force

RONALD FISCHETTI, ESQ.
Attorney for Defendant DeLiso

MICHAEL GILLEN, ESQ.
Attorney for Defendant McNamara

LEONARD J. MEISELMAN, ESQ.
Attorney for Defendant Thomas McNamara

MS. MARION SELTZER
LEGAL AID SOCIETY
Attorney for Defendant A.M. Merolla

JOHN LEONE, ESQ.
Attorney for Defendant A. Merolla

Also present:

RICHARD MC MULLEN
Special Agent, Federal Bureau of Investigation

ns:ss
laml

THE CLERK: Case on trial, United States of America versus John DeLiso, John McNamara, Thomas McNamara, Alphonse Merolla and Alphonse Merolla.

MR. RITCHIE: Your Honor,I would like to introduce Ms. Marsha Katz. She is another Department of Justice Attorney. She will be my co-counsel. It has not been decided as to whether she will handle any witnesses. It is her first criminal case. I just wanted to let the Court know there is that possibility.

THE COURT: All right, gentlemen.

Now, let me see that we are all squared away.

Mr. Gillen, you will appear again for John McNamara?

Alphonse Merolla --

MS. SELTZER: I am representing Mr. Merolla.

THE COURT: Now, Mr. Alphonse Al Merolla will be represented by Mr. John Leone?

MR. LEONE: Yes.

MR. RITCHIE: This is Alphonse Al Merolla?

MR. LEONE: It is all right we refer to him as Al? We'll have an Alphonse and an Al. I think we have agreed on that.

MR. RITCHIE: I do not think we agreed to call the second Alphonse Merolla Al.

THE COURT: I did. Have you a suggestion? We

must differentiate them.

MR. RITCHIE: Perhaps by the use of their middle initials if they differ?

THE COURT: It is rather confusing.

MR. LEONE: I do not see the point.

MR. RITCHIE: Throughout the course of the trial the Government witnesses will refer to a man I refer to as the first Alphonse Merolla as Al Merolla and the other individual will be referred to by other names. --

THE COURT: But he will not admit the propriety of those references.

MR. RITCHIE: I doubt he will admit it. That is why I would ask to use middle initials.

THE COURT: I am not sure that they have any.

MR. LEONE: Do you want to make one up?

DEFENDANT ALPHONSE MEROLLA: You gave me a name, you might as well give me an initial.

MR. LEONE: My client has none.

DEFENDANT ALPHONSE M. MEROLLA: I have an M.

THE COURT: Alphonse M, like in Michael?

DEFENDANT ALPHONSE M. MEROLLA: Yes, your Honor.

THE COURT: Mr. DeLiso, Mr. Fischetti will represent you?

MR. FISCHETTI: Yes.

THE COURT: That leaves us with Thomas McNamara. Who will be representing Mr. Thomas McNamara?

MR. MEISELMAN: Leonard J. Meiselman, your Honor.

THE COURT: Are we particularly arranged in any way?

MR. GILLEN: We are in the order of the indictment going around the table.

MS. SELTZER: Would you explain to the jury that is the way we are seated, so they do not get any further inference --

THE COURT: You are going to stay in those chairs, every one of you?

MR. GILLEN: Yes, your Honor.

THE COURT: Mr. Fischetti, Mr. DeLiso, Mr. McNamara, Mr. Gillen, Mr. Meiselman, Mr. Thomas McNamara, Mr. Alphonse M. Merolla, Ms. Seltzer, Mr. Alphonse Merolla and Mr. Leone.

MR. LEONE: Please pardon my back from time to time?

THE COURT: I imagine you will be taking a more angular position as the jury arrives. You wouldn't want to give them the shoulder.

MR. LEONE: No.

MR. RITCHIE: In the light of the positions of the defendants and counsel at table, when it comes time for a witness to make an identification, would it be permissible for him to step down?

THE COURT: I would think so. It would be a little hard to point.

Mr. Meiselman, to stop on a very small point. Do you pronounce your name with an S or a Z?

MR. MEISELMAN: As far as I remember, it has always been an S.

THE COURT: Thank you.

We did have circulated to you, gentlemen, a redoing of the indictment. I ask you to look at it and tell me whether it looks all right to you?

MR. GILLEN: I must say that I have never received a copy.

MR. MEISELMAN: Neither have I.

THE COURT: This is beyond belief. Do we have some extra copies?

(Documents handed to counsel.)

MR. GILLEN: We have no objection to the form of the indictment.

MR. RITCHIE: The Government's only objection would be to the Alphonse Al Merolla and then Alphonse Merolla rather than Alphonse Merolla and later Alphonse

M. Merolla.

MS. SELTZER: I didn't understand what he said.

THE COURT: In other words, on page 2, paragraph 3, line 6 Alphonse M. Merolla and the defendant Alphonse Merolla and so on wherever it appears.

Is that it?

MR. RITCHIE: Yes, your Honor.

THE COURT: It is so much better than trying to tell the jury that there are two indictments and that they have been consolidated and that there have been certain statements objected to by one defendant, which didn't remove -- well, they will become familiar with those things as the trial goes along.

I think the last time, gentlemen, we selected a jury together for this case we proceeded in six rounds with the Government having one challenge in each round and the defendants having three in round 1, three in round 2, two in round 3, two in round 4 and one challenge in each of the last two rounds, five and six.

I believe the defendants challenged first and then thereafter the sides alternated on challenges.

When it came for the selection of alternates --

MR. GILLEN: We had four, your Honor.

THE COURT: Do we have a clear recollection?

MR. RITCHIE: Yes, your Honor.

MR. GILLEN: I think we lost two and ended up with two.

Didn't one of the alternates get ill -- her husband was sick?

THE COURT: I do not think we had any substitutions. I think the attrition was among the alternates.

MR. GILLEN: Her husband was sick.

MS. SELTZER: In view of the fact that there are so many defendants, would you consider the possibilities of giving us some more.

THE COURT: That is why you got three on the first two rounds. The case is not one in which any radically opposing defense interests are presented. The defense is that the prosecuting witness is totally unworthy of belief and there is no war among the defendants. The episodes involved -- the critical episodes involved are such -- nothing much happened at any one occasion that creates special problems for any one.

MS. SELTZER: Well, when you have five or six lawyers it is very difficult for us to agree and I think that maybe --

THE COURT: You mean some like blue and some like pink?

MS. SELTZER: Yes.

THE COURT: I don't think counsel should be encouraged to dispute among themselves about the selection of jurors. They ought to make an effort to agree. Counsel can take counsel and as we tell jurors listen to one another and not simply be bullheaded and say "I want Jones or I want Smith."

MS. SELTZER: I just think it would be easier. I know that we all have different feelings as to who would be good and who would not be good as prospective jurors.

THE COURT: You seem to be alone, Ms. Seltzer.

MR. GILLEN: We all agree.

MR. LEONE: We agree. We just allow one attorney at a time to speak. I think we would not be opposed to having a few more if the Court sees fit to grant it.

MR. RITCHIE: They are already getting two more and the Government is not getting any increase. I think going beyond that would needlessly complicate the jury selection procedure.

THE COURT: The number of challenges allowed is so ludicrously large -- and as you know in the proposed rules the number of challenges will be reduced -- I am sure with the least sacrifice of any interests of justice whatever.

MS. SELTZER: Another reason that I asked, I was not present at the last trial but from my reading of the record it appears that there are a good number of ethnic slurs that occurred during the course of the trial and because of that it is very possible that we have serious problems with certain people from certain groups being on the jury and it may be incumbent upon us to try to keep off certain groups because of the comments that were said by certain of the witnesses. I am sure that you are familiar with those comments.

MR. RITCHIE: I believe the Courts of the United States should not be engaged in a trial by ethnics -- ethnicity, it should be engaged in a trial with a jury of peers -- people from many many different backgrounds.

MS. SELTZER: I would agree except if the prosecution raises it, as it did on the last trial, and on certain occasions unnecessarily -- if it is going to be raised, is going to be one of the issues before this jury. It was raised by one of the Government's own witnesses -- for reason that I couldn't understand was allowed in -- and during my reading of the record found it necessary to use the word "Kike" which I find offensive and which I believe many of the jurors will also, and it was part of the Government's

tactics. For that reason I --

THE COURT: It did not come from Government counsel.

MS. SELTZER: From Government witness.

THE COURT: I take it he was sworn to tell the truth.

MS. SELTZER: Yes, your Honor.

From my reading of the record it was not a necessary part of his testimony. It puts us in a difficult position as far as allowing Jews on this jury -- it honestly does, your Honor. It is something that we have discussed.

THE COURT: I do not quite see how that would cut against you.

MS. SELTZER: Because allegedly from what I recall Agent McMullen testified that one of the defendants used the word "Kike" in referring to Mr. Harold Goberman.

My feeling -- that's a feeling as a Jew -- if I were sitting on the jury and I heard that word allegedly used by one of the defendants, who is not a Jew, I think there is a good possibility that there would be an automatic reaction to that expression.

Another thing I could suggest, if you do not want to give us more challenges, perhaps it would be

advisable to leave out that word from the trial.

MR. RITCHIE: If I may, the word "Kike" was some other slur on a Jew was used to Harold Goberman by Thomas McNamara. Thomas McNamara again used that word in referring to Harold Goberman in a conversation with myself and Mr. McMullen. I believe it shouldn't be cut out. It is appropriate. It reveals -- it corroborates to some degree Mr. Goberman's allegations that besides being threatened, he was villified by Mr. McNamara and I submit it is relevant and proper.

The fact that a man uses ethnic slurs is a fact that simply exists. The fact that violence was allegedly used in this case is also perhaps regrettable and will cause reactions among jurors. Unless the Government can prove the villification, the threats and violences, it can't prove its extortion.

MR. MEISELMAN: I had intended to do this later, but since it has come up and since I do represent Thomas McNamara, perhaps the matter should be aired now.

In a reading of the record I find that testimony came out only one place and that is in the 302 of Mr. McMullen. It has no relevance to the issues. It was only how Mr. McNamara may have referred to Mr. Goberman to Mr. McMullen and not the way he spoke

to Mr. Goberman. If that is so -- and I do not think it is material to the issues in this case -- then I think we will be severely prejudiced, because it is highly inflammatory to anyone who may be Jewish on the jury and I think it is intended as such.

THE COURT: I have no recollection of the exact contexts, Mr. Meiselman, but I take it your point is that the evidence did not show the use of this particular word?

MR. MEISELMAN: That's correct.

THE COURT: As among the defendants or to Mr. Goberman himself?

MR. MEISELMAN: That's correct.

THE COURT: That it came in only through Mr. McMullen's testimony.

Was he a witness?

MR. RITCHIE: Yes, your Honor.

THE COURT: As to what Thomas McNamara allegedly said to him?

MS. SELTZER: Correct.

MR. RITCHIE: I believe --

THE COURT: Is that correct?

MR. RITCHIE: No, it isn't. There is testimony by Gary Taibbi. He was the construction foreman -- the young man with the black hair that your Honor may recall --

who testified that Thomas McNamara during the course of tirades against Mr. Goberman referred to him by one or another of the --

MS. SELTZER: What word did he use?

MR. RITCHIE: Whether it was "Hebe, Kike" or "Yid --"

MS. SELTZER: The words he used were "Jew bastard."

THE COURT: What's that?

MS. SELTZER: The words he used were "Jew bastard." It was not the word "Kike" which Mr. Ritchie may or may not realize does have --

MR. RITCHIE: I do believe that beside Jews on the jury there will be other people.

THE COURT: It hardly makes it any better.

MR. RITCHIE: I am not arguing that, your Honor. I do not think what the implication is. I do not happen to be Jewish. I do know it will be a jury of their peers. It will be a mixture of Christians, Jews, and Atheists and maybe some other people, and the fact that Harold Goberman was called "Jew bastard, Hebe, Kike" or whatever by Thomas McNamara, is, I think, in light of Mr. Goberman's background corroborated by Mr. McNamara's use of the word "Kike" to Mr. McMullen.

THE COURT: The one thing I am interested in

getting back to is the bearing of this on the number of challenges and I think we have rather come to a very different question and that is whether there is an appropriate place in the case for this kind of evidence and Mr. Ritchie appears to suggest that there is, rather than whether in effect the parties are going to have to get a jury other than the one they might otherwise select in order to guard themselves against the possibility that this evidence will be repeated; is that correct?

MR. MEISELMAN: Yes.

THE COURT: So why don't we deal with the real issue, which I take it is, is there any place in the case for that particular kind of evidence.

Now, I take it that Mr. Ritchie's argument is that it shows the intensity of Mr. McNamara's disaffection and the length to which he was prepared to go.

As I understand it, even if one were prepared to concede a certain relevance in that argument, you would still argue for the exclusion of the testimony on the grounds that its prejudicial effect as against, particularly, Thomas McNamara would be far greater than any probative value that it had on the issues in this case, which have to do not with words other than words

of threats, but with violence, fear of violence and the threat of violence; is that right?

MR. MEISELMAN: You have argued well on my behalf, your Honor.

MR. LEONE: Yes.

MR. RITCHIE: You basically state the Government's position, your Honor.

THE COURT: Well, this is a very metropolitan city. We are trying the case in Brooklyn, not in the Port Jefferson area. One does not hear that kind of talk very much any more in Brooklyn. I do not think it is just because Jews are just as big, strong and tough as any one else and no longer by any means people that you can push around, but that perhaps we have had to live together and learn to live together and have long since enjoyed living together.

Now, that may not be exactly the same as the kind of thing you will find on the East End and among the older parts of the population on the East End and what might be regarded as -- from our point here -- as the kind of passe expression that smacked of the last century in this city. It may not be that obsolete out there, but we are trying the case here and I do think that that kind of language when injected into a case tried in this city and in this Court would be

far more prejudicial than probative of the attitudes and motivations of Mr. McNamara and I think, therefore, that Government counsel should caution the witnesses --

MR. RITCHIE: That includes Mr. Taibbi as well as Mr. McMullen?

THE COURT: Yes.

MR. RITCHIE: Yes, your Honor.

MS. SELTZER: Thank you.

MR. MEISELMAN: Thank you.

THE COURT: On challenges, suppose we have the defense have four challenges on each -- three challenge on each of the first four rounds, no change in the last two. I do think that counsel ought to agree together on challenges, because I think that a month's unfortunate jury selection could slow from a division of the job of exercising challenges. Challenges should be a matter of discussion among the defense counsel so we may use all our efforts to get as fair a jury as we possibly can.

MS. SELTZER: Thank you.

MR. RITCHIE: Will there be any increase in tl number forthe Government?

THE COURT: No, I will keep your nose right down there on the grindstone.

MR. RITCHIE: You are putting the Government in

a position of having six as opposed to the defendants having fourteen.

THE COURT: Precisely.

MR. RITCHIE: I would submit that makes the Government's job even harder.

THE COURT: No, because I do not really think, Mr. Ritchie, that the Government's interest is a bit different from the defendants' interests. Really there isn't such a thing as the Government. What we are all after here is to see that we do not get people on the jury who are not a fair cross-section and totally disinterested.

The defendants' fantasy -- and it is 90 percent fantasy -- that they have a particular interest in sorts of jurors and that is one of the great myths. It isn't true at all. But it lends a great deal of comfort to the defense so he goes into the trial with a little more equinimity of spirit. Beyond that it is totally useless.

MR. RITCHIE: Government counsel also fancies itself on many occasions to be skillful at jury selections and to --

THE COURT: I am sure we could protract this if we wanted to for two weeks and make a huge thing out of it, only it isn't.

MR. RITCHIE: I will go into this trial with somewhat less equinimity than defense counsel.

THE COURT: Yes.

MS. SELTZER: Is it possible for me to ask one further thing?

When you are questioning the jurors, would it be possible for you to question them as to whether they had any problems with buying automobiles, whether any of them have any particular animosity towards car dealers because they bought a lemon. It is possible that some of them have bad feelings -- had bad experiences.

MR. RITCHIE: Your Honor, I have no objection to that.

I'd also ask that a further question be posed about bad experiences with contractors.

MR. GILLEN: We have no objection to that.

MR. RITCHIE: In fact, I will withdraw that.

MR. GILLEN: We'd ask for that, your Honor.

THE COURT: That seems to be tantamount to asking people if they ever built a bad house.

Have you given defense counsel a copy of your most recent memorandum?

MR. RITCHIE: Yes. That's a question that I would like to deal with now.

MR. GILLEN: I think your Honor's suggestion that perhaps the evidence will help us on this, which you made in your opinion, happens to be so.

Until we see what the evidence is, it is very difficult to weigh or equate the Archer and Maze decisions in this case.

MR. FISCHETTI: If I may say, before we get into an argument on this I am familiar with the Archer decision. Our office represented him.

At this juncture in the trial, before the Government presents their evidence, I am not in a position to argue Archer.

THE COURT: Except you were here at the first trial and heard the evidence.

MR. FISCHETTI: I don't know if Mr. Ritchie intends to proceed in the same fashion and offer the same evidence.

MR. RITCHIE: I would represent to the Court, with the exception of one or two additional commodities used in interstate commerce, the Government's evidence will be precisely the same.

The problem has not to do with the amount of commodities coming in, but with the connection of the interstate commerce to the extortion. I think with that representation and what the evidence will be --

other than with the addition of one of two more pieces of commodities -- I think we can reach a decision at this time and I would respectfully request that the Court make a decision at this time to prevent a needless trial if the Court rules in favor of the defendants and to afford the Government the opportunity of Appellate review.

Your Honor has indicated questions and a lack of certainty on the exact standards of the law today and I would respectfully request the opportunity to prevent a needless trial and to give the Government the chance for review by the Second Circuit with a decision at this time.

(Continued on next page.)

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THE COURT: You were asking me to dismiss the complaint so you can go up?

MR. RITCHIE: If your Honor is inclined to dismiss at the close of the Government's case -

THE COURT: That creates double jeopardy and it is the end of the whole show.

MR. RITCHIE: Yes, your Honor. That's precisely why I would request the opportunity at this time for a ruling. The evidence has been before the Court before. It will not change material with respect to the questions that your Honor has --

MR. MEISELMAN: I think it will.

MR. RITCHIE: A decision at this time would be in the greatest fairness to the Government and to the defendants, in that it would prevent a needless trial.

THE COURT: Let me see if we can understand each other. I try to phrase my memorandum just as carefully as I could.

I think, Mr. Ritchie, this glancing hurriedly through his memorandum has put his view of the matter again in one single phrase or sentence which really comes down to saying that undeniably -- if I may amend -- one would have to say for a dozen different Governmental purposes that Harmac was engaged in commerce or pursuing activities affecting commerce -- engaged

in commerce because of his introducing into the state of New York component materials from out of the state and incorporating them into a building in NEw York.

In the secondary sense it's that corporation's activities and relatedly Goberman's that had to do with the continuance and enhancement of the flow of automotive parts through the McNamara people facility, both of these are for many statutory purposes related to commerce connected with commerce, affective -- to invent a word that the machine will try to reject -- affective of commerce and hence that any of the violence described in the Hobbs Act named at Harmac, his performance and his continuance on the job, was within the language of the Hobbs Act.

Is that about it, Mr. Ritchie?

MR. RITCHIE: I believe that's the decision that was reached by the Court at the last trial, that the Court seemed to indicate its decision absent the import of Maze and Archer, in the latest memorandum and order.

THE COURT: Yes.

MR. RITCHIE: I believe the only question that is really before the Court is whether the Maze and Archer decisions require any pre-examination of the prior holding of this Court and the long line of cases--

THE COURT: You cited the Ruiz case -- Ruiz against the United States, 401 U.S. 808.

MR. RITCHIE: I raise that only in connection with the Archer decision.

I believe Ruiz shows the thinking of the Supreme Court on that statute and why the Supreme Court reached the decision it did with regards to that statute and why the Second Circuit, following the Supreme Court reached its decision in Archer.

THE COURT: Well, what I meant to suggest by my memorandum is that the reach of the indictment under the Hobbs Act has been very very broad in the past and that very indirect effects on commerce have been accepted as sufficing to make applications under the Hobbs Act.

I raised with counsel the question whether we can expect that to continue, not in the light of the holdings in Archer or in Maze or in such a case as Ruiz, but in connection with the cases reflecting the extent to which the criminal jurisdiction of the Federal Government has been purviewed into aspects of commerce and it's remoter affectations that might not seem really to be very closely connected with commerce

Looking at this case, I suppose 50 years ago, someone would say, "How can there be anything more

local than digging a foundation and erecting a permanent fixture in place under contract locally made between local people, and which act does not accept accidentally require or derivatively require any movement of goods or services in commerce. Theoretically, almost anything could be produced in New York. It once had forests, it has the famous Chateaugay Pigiron Works."

I don't think it has any bauxite, but I do not know how much bauxite derivatives were in the building. I am sure some. Cement can be made anywhere you have water power. New York has water power.

What we are talking about is the bringing in of materials from outside the state.

You are going to have to refresh my recollection on this. The materials brought in from out of state were not, I think, as I recall brought directly by Harmac from the out of state suppliers, but from local suppliers who necessarily -- because they didn't stock much material and some of them were almost certainly made to measure --

MR. RITCHIE: Yes, your Honor.

THE COURT: -- would be shipped in from out of state to the material men who would then keep it either in their warehouses or on the job site, but only for the length of time necessary to complete the job and

the shorter the time they had it in their yards or on the job and uninstalled, the better since it was consuming their working capital every moment it was not incorporated into the building and productive of payment.

Now, the use of the building -- certainly the building was a building of a sort which you would have to say frustrated the whole idea that its design, if it wasn't an automobile dealership building, and therefore would almost inevitably involve shipments of merchandise to be dealt in interstate commerce. I do not know if we make any Buicks in this state, but hardly enough the indictment does not mention automobiles themselves. It seems to say parts.

MR. RITCHIE: Yes, your Honor.

THE COURT: I think at the last trial I particularly noticed that.

MR. RITCHIE: The whole is the sum of all its parts.

THE COURT: The parts were assembled so it could function.

Now, we turn our attention to whether we are dealing with an inference and whether it is a direct or indirect inference -- what kind of inference is it? This is not a case about the actual interference with

commerce. It is a case about a conspiracy to interfere with commerce. It doesn't have to be a demonstration of interference, but it does have to be a conspiracy to interfere.

I think there are a number -- at least one case in which certiorari has been granted, which put Crimmons to death in this case, that went up from the Southern District of Judge Feinberg -- the name of which slips my mind for a moment. That may result in a re-examination of Crimmons. There is still the thought that Learned Hand had in Crimmons. When you are dealing with conspiracy the contemplation of some Federal repercussion is basic or else it's a little difficult to see what the concern o f the Federal Government with the whole affair is. That is notionally the case, whether or not the conspiracy is carried into effect, but I think it is a little difficult to think of it usefully where the conspiracy does result in the action which the parties agreed upon or are alleged to have agreed upon. But here again we are not concerned directly with anybody's program to prevent commerce or to do anything, except effect it in some way.

Now, here I suppose you could argue that this was supposed to -- if ever supposed -- to effect commerce, to accellerate commerce in every possible

aspect. That's what the whole fight was about. It was not being completed. The interstate materials were not being incorporated as per plan and on schedule and the completion of the building at the desired earlier date was threatened. That at least is the defendants' argument and such evidence as they presented, but I think we took at face value the word "effect" as meaning exactly what they said, since that's the function of Congress to mean what it says and say what it means, right?

MR. RITCHIE: I should hope so, your Honor.

THE COURT: That's where we are. It seems to me that we are not dealing with conduct which for example like a hijacking or interstate trucks and the taking of the load grossly results in arrests and diversion of interstate commerce and a direct affectation. We are not dealing with anything in that order at all. We are dealing with what you might call the doing of things which on examination can be shown to have effection on commerce. Is that enough?

We really in the mail fraud cases took very much that line. You remember in the mail fraud cases you are also dealing with a scheme -- the scheme simply meant by the use of commerce. It's just at that point that the Court spoke that the scheme itself --

the perpetration of the fraud on the hotel keeper -- sure it had a consequence, but the scheme itself didn't deal with any affectation of commerce at all or any use of the mails. It dealt with getting lodging for nothing, but in the knowledge of course that the hotel keeper was being defrauded simply because the whole scheme required use of the mails, therefore, inevitable delay. He'd be onto the next town -- no matter how quickly the mails functioned and the credit system functioned -- he'd be onto the next town before they were felt. That's what I am concerned about, that we may not any longer have available to us an approach which gets so far from thelanguage of the statute. Are we dealing with a statute that really requires the affectation by the conduct of movement or commerce as the very gist of the scheme and of the charge or is it enough that the things done on examination will be found to be effective of commerce within the statute's meaning?

MR. RITCHIE: Your Honor, with respect to the question of Crimmons? It was a second circuit decision dealing with the Hobbs Act conspiracy --

THE COURT: You were kind enough to supply the citation, 123 F. 2d, 271, Second Circuit 1941.

MR. RITCHIE: There is a separate Second Circuit

decision on conspiracy under the conspiracy cause in the Hobbs Act and that's United States v. Varick which I cited to the Court in the prior trial. I would like to note in the recent trial of United States v. Vario, which was tried before Judge Judd in the Courtroom across the way, the famed Superfecta case, in that case Judge Judd was presented with another self-contained conspiracy cause -- a conspiracy provision contained in 18 United States Code 224.

After looking at the legislative history regarding that violation, Judge Judd ruled that "Knowledge of the Federal element in the sports bribery statute wasn't necessary in a conspiracy under the sports bribery statute, because it wasn't subject to the old time thinking of Crimmons and would be looked at separate from Crimmons."

I think United States v. Alejandro (phonetic), which was a Second Circuit decision, questioned the language in Crimmons, but felt bound by stari-dicises not to overcome Crimmons and to stay within Crimmons until there had been some revision in the law.

Judge Judd didn't feel bound on a self-contained conspiracy such as 18 United States Code 224. With respect to the question of the thinking of the Courts-- of the Courts on the continuing expansion of Federal

police power, continuing expansion of Federal prosecutions, I would like to note to the Court that in Maze, the majority opinion noted that it would have been within the power of Congress to prohibit the transaction in the Maze case.

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THE COURT: I do not think the Court in Mays was imposing any Constitutional limitations. It was rather interpreting the statute, and that is all I am suggesting here.

MR. RITCHIE: With respect to the Ruiz case, and the question of what the Court is doing to limit Federal Police jurisdiction, in Ruiz the Court said -- I noted it in my memorandum of law -- It is not for the Court to decide the delicate questions of Federal-State relationships. They pose the question to Congress, and they left to our part of our Government that has the Legislative powers, that question.

THE COURT: I quite agree. What we are dealing with is, What did the Congress do. The thinking of that in terms of the supposed reluctance of the Congress to go any further than it meant to go, and whether we, as Courts -- the Court system has stretched Hobbs Act beyond the expectations of Congress, and beyond its intendance.

MR. RITCHIE: I cannot think of the case -- I will get it for you -- where the Supreme Court and the Second Circuit have both stated that it was the Legislative intent of the Congress in passing 18 United States Code, 1951, to use to the broadest its powers under the Interstate Commerce clause, to bring within the prohi-

bitions against extortion any and all affectations of commerce, no matter how remote, no matter how unintended. I think the language used by the Congress in the statute very clearly establishes the broadest exercise of the delegated powers under the Interstate Commerce clause.

MR. GILLEN: As I said, I think we have to wait for the evidence in the case. I do not think we can argue it in a vacuum.

THE COURT: They would rather take it up when you rest.

MR. GILLEN: That's correct.

MR. RITCHIE: I would ask for a decision now. If I do not have a decision, I will have no Appellate remedy, and your Honor has indicated that he himself is not certain.

THE COURT: You see, Mr. Ritchie, what I have been trying to say to you is, I took the position on this last time around. I am not changing that position at this time. The Government has the power to reconsider, to decide itself whether this case is better prosecuted by the State or by the Federal Government. This case was once tried. To return to the trial of it now is to express prosecutorial confidence in the jurisdiction of the Congress and the Court.

Now, I cannot say that there is any Circuit Court,

District Court or Supreme Court case that would authorize me to dismiss this Indictment in effect on the basis of a sort of tacit understanding -- We'd have to walk a little carefully here to make sure that the full text of the Interstate Commerce here charged may be found by reference to the testimony and the Exhibits at the first trial, and we are not at this point in any way directly or indirectly re-arguing the motion to dismiss the Indictment at the close of the Government's case, and at the close of the whole case from the last trial.

Are you clear?

MR. RITCHIE: Yes, your Honor.

THE COURT: That is the only way that you could look at this. On that basis, I cannot dismiss this Indictment if the Government wishes to proceed.

MR. RITCHIE: May I have a few minutes before we proceed?

THE COURT: Surely.

MR. GILLEN: I have three small items:

One, when the Court ordered Mr. Ritchie to produce the Index Cards of the Strike Force that opened this case --

THE COURT: Yes.

MR. GILLEN: -- it was opened under 18 U.S.Code

894.

THE COURT: I know.

MR. GILLEN: As well as 1891.

THE COURT: I did not notice that.

MR. GILLEN: 894 is the Extortionist extension of the Credit statute. It is a shylocking statute that anyone that would collect shylock monies would be charged under 894.

That leads me to believe that the evidence -- that the Government has some evidence or allegation, probably by Mr. Groberman, that there were shylocking monies involved, and there was an attempt to collect these shylock monies by one of the defendants, or other parties. I have no way of knowing. What does strike me is that we have gone through a trial, there was a proper Brady demand made, and no such evidence has been made available in this Court. That was the first time we ever got a look at one of these internal documents from the Strike Force.

THE COURT: I saw this as the old file -- Do you see what I mean? The new file, as I understand it, was 741240. These references are in 725213, which is the old file.

MR. GILLEN: In any event, they are here. Quite frankly, these were all kept together. They're actually

twelve dates, and the events of this case appear on the card of the Extortion Extension of Credit. I would made a demand on the Government for any ond all evidence as to the Extortionate Extension of Credit, and for any attempt by my client or anyone involved in this case, or not involved in this case, to collect an extortionate extension of credit --

MR. MEISELMAN: Directly or indirectly.

MR. RITCHIE: Firstly, may I say, even if we had evidence in our possession of shylocking activities by any of the defendants, that is no way exculpatory. Forgetting that for the minute, I would like to say this case was not opened by me. I received the file very shortly after Mr. Goldman came in and spoke with Mr. Dennis Dillon.

I interviewed Mr. Goldman, and he never apprised me of anything that was in violation of 894. I believe that if we -- if the evidence was slightly different concerning the trailer, and the extension of the credit in that case, and the beating on June 5th, there might be a violation of 894, but the evidence isn't as such --

MR. MEISELMAN: The Government, in the last trial, contended that the defendants got together for the purpose of extorting money from Mr. Goldman or his company. That was the violation of commerce.

Now, if they have a file which shows that they -- that some of the defendants, or all of them, got together with Mr. Goberman, and for another purpose, it is completely contradictory to the tack they are taking in this case, and I think it would be --

THE COURT: I cannot quite see that.

MR. GILLEN: Mr. Ritchie has referred to some type of extension of credit --

THE COURT: What he said was that the evidence with respect to the trailer, and as I recall the evidence with respect to the trailer -- while it managed to get itself confused at the last trial -- had to do not only with the trailer, but with the financing of the acquisition of the trailer, because, as I recall it, Mr. Goberman located the trailer, and had to get financing to acquire the trailer --

MR. RITCHIE: It wasn't financing in the sense of paper. It was an outright advance.

MR. MEISELMAN: It was loaned by Mr. McNamara.

THE COURT: My point is that he did not have the price of the trailer to advance.

MR. RITCHIE: That's correct.

THE COURT: Nothing was yet due under the Harmac-McNamara re New Car Inc. Nothing was getting done. Maybe there had been some work --

MR. MEISELMAN: Some.

THE COURT: That may have been done by a different firm.

At that time, as I recall it, when he did locate a trailer suitable for use on this construction job, the money to buy it was received from the McNamara interests. I forget whether McNamara --

MR. GILLEN: I think the father advanced it.

THE COURT: Or whatever. And in that connection, I do not know whether anything was said about the terms of repayment. I cannot recall if we had any evidence about that.

MR. RITCHIE: I do not believe we did.

THE COURT: I do know, at a later time that $1300 was more or less related to the trailer business. I never did understand how the trailer could be released, and the $1300 paid --

MR. RITCHIE: He owed $15,000 at the time --

MR. MEISELMAN: In addition to the trailer.

MR. GILLEN: The Government has not answered whether there is such a statement. I appreciate your Honor's analysis, and I would agree, except that 1894 is a shylocking statute, and any --

THE COURT: 894.

MR. GILLEN: I am sorry, 894. It is shylocking.

MR. RITCHIE: It does not require any vigorous, does not require any usurious interest rates, all it requires is the use of force to collect an extension of credit.

MR. MEISELMAN: May I be heard?

MR. RITCHIE: There was force used in this case. We don't have a violation of 894, because according to the testimony of the Government witnesses, the sum advanced had been repaid already, and this was a separate extortion.

MR. GILLEN: We want to look at the complaint Mr. Goberman or anybody else made as to this case by the extortionate extension of credit. It flies in the face of the Government's theory. Mr. Ritchie has still not answered --

THE COURT: I take it you have received all the 3500 Material?

MR. GILLEN: I would have hoped we did.

THE COURT: I do not see that the material, if any, related to aspects of the trailer transaction, and the credit in that transaction could possibly be sorted out and withheld from counsel, and I assume that none of the material related directly or indirectly to the trailer transactions, and the financing of it has been withheld from counsel to the extent that it could possibly

be producible under 3500 Material.

MR. GILLEN: I assumed the same thing until I saw that card.

MR. RITCHIE: That's correct.

THE COURT: Is that right?

MR. RITCHIE: I would like to note --

THE COURT: The rest of it seems to be a question of, How do we characterize the evidence that we have --

MR. GILLEN: It would be Brady Material if there is a different story by Mr. Goberman.

MR. RITCHIE: There was no different story. That was the original allegation, and that was the only allegation.

THE COURT: The question is, Have they everything having to do with the trailer transaction, and any other attempts to collect money from Goberman?

MR. RITCHIE: Yes, your Honor, they do.

MR. GILLEN: Then I would ask whether they have any evidence from Mr. Goberman of any debt that has anything to do with this case?

THE COURT: I think I asked the question, and I believe that it has been answered. Nobody suggested that Mr. McNamara, McNamara Re New Cars Incorporated, or McNamara Buick, lent any money at any time to Goberman or to Harmac, except to the extent disclosed in the evi-

dence here, and in the 3500 Material; is that correct?

MR. RITCHIE: That's correct.

MR. MEISELMAN: With one exception. I agree with what your Honor has said. There may be other aspects. Your Honor stated before that we are concerned in this trial with a Conspiracy. The Conspiracy as shown by either an overt act, or perhaps by even an inference --

THE COURT: No overt act under this statute.

MR. MEISELMAN: Then it would be an inference by the conduct of the parties. If there was a contact between any of the defendants and Mr. Goberman, or there were transactions -- between any of the defendants and Mr. Goberman, with respect to any other matters, that lends a different aspect to this case, and the Government's position vis-a-vis our clients --

THE COURT: I think we had some testimony from Mr. Goberman that there had been some contract which interest and the McNamara interest --

MR. RITCHIE: Your Honor, I don't know.

THE COURT: How Mr. McNamara got to Mr. Harold Goberman, or vice versa, but I believe in a way getting to Harold Goberman was a miscontact --

MR. GILLEN: Yes, Harold Goberman had been building a building some 200 yards up --

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THE COURT: Therefore work that Mr. McNamara had observed.

Now, what Mr. Meiselman says, wasn't this set of circumstances the only set of dealings among these people -

MR. MEISELMAN: All the defendants.

THE COURT: I take it the answer to that is "yes, as far as the Government knows"?

MR. RITCHIE: Your Honor, the Government has turned over all 3500 material --

THE COURT: Please answer my questions.

MR. RITCHIE: Your Honor, I believe to do so would give away part of the Government's case.

THE COURT: No, it would not.

MR. RITCHIE: It is my understanding from Allen Goberman, as I am sure Mr. Gillen is aware, that there were some other dealings they could elicit on the cross-examination of any witness they chose to.

I have no material to turn over to them in that regard and they will have to trust to their own wits and powers of cross-examination.

MR. GILLEN: Are we playing games?

MR. RITCHIE: I am not. I have no writings to that effect, no memoranda to that effect. I have nothing to that effect.

THE COURT: Then what are we talking about?

MR. RITCHIE: It is my understanding, according to Allen Goberman, there were other dealings with Allen Goberman and the Merolla's that can be elicited on cross-examination. Mr. Meiselman is apparently aware of it --

MR.GILLEN: That is not what I was talking about. This is something else.

MR. MEISELMAN: I am glad I just heard that.

MR. RITCHIE: They can cross-examine any witness on the stand --

MR.GILLEN: We had a trial. We made a demand for Brady material. I do not understand Mr. Ritchie's position.

THE COURT: I do not either.

MR. RITCHIE: Your Honor, I have no material in my possession. I have spoken to my witness and he states he had certain other dealings with the Merolla's and he is willing to answer questions on it.

THE COURT: I think there was some reference to that. He allegedly was able to identify Alphonse -- not Alphonse M. Merolla -- on the basis of recollection or something when he saw him come to the job. Maybe that was because of something that preceded the occasion on which he saw Alphonse -- not Alphonse M. -- Merolla

come to the job site before one of these meetings downtown and indeed, I think, wasn't the evidence at that point --

MR. MEISELMAN: He denied it, your Honor.

THE COURT: -- Alphonse was part of the escort downtown?

MR. MEISELMAN: In the reading of the record --

THE COURT: Was that the claim?

MR. MEISELMAN: Yes, on the previous trial.

In the record on the previous trial.--

THE COURT: There was something in there that might have suggested that one or another of the Merolla's was not totally unknown to Goberman through the other intermediary who put his nose in and got it out --

MR. GILLEN: Spatorella.

THE COURT: Spatorella, is that who you are talking about?

MR. RITCHIE: No, your Honor.

I am talking about, for example, in the 3500 material there is reference to Alphonse Merolla attempting to coerce -- not coerce, but to have Harold Goberman use certain of his contractors --

MR. LEONE: Are you talking about Alphonse M.?

MR. RITCHIE: Yes,

-- to use certain subcontractors to whom he felt a certain affection.

MR. GILLEN: Is that what Mr. Ritchie says he has? We know about that.

MR. MEISELMAN: Mr. Ritchie said that Allen Goberman told him that he or his brother had dealings with the Merolla's -- one or all of them -- prior to his doing business --

MR. RITCHIE: I never said prior.

MR. GILLEN: He said he had writings of that because that's in the 302. It has to be something else he is hitting on.

MR. RITCHIE: I am not hiding anything. Mr. Allen Goberman is a witness available to both sides.

MR. MEISELMAN: Your Honor, if he puts Goberman on the stand and he says "I never saw Alphonse before" and Mr. Ritchie knew that Mr. Goberman had seen Alphonse before, whether in his 302 or as 3500 material, I am really somewhat shocked that --

MR. RITCHIE: I do not know that I ever knew that --

MR. MEISELMAN: You so told --

MR. RITCHIE: I was not so told. I have never been told that by Allen Goberman.

THE COURT: You see, you put that in the negative-permanent form.

MR. RITCHIE: I have never been told by Allen Goberman or Harold Goberman that --

MR. LEONE: Or anybody else?

MR. RITCHIE: I have never been told by anyone, your Honor.

Your Honor, I believe Helen Goberman -- Helen Goberman is the former Helen McNamara -- Allen Goberman's wife that she thinks Harry is the one behind this whole thing. She thinks this was a plot to hurt Mr. McNamara by Harry and the Merolla's. She has a great --

THE COURT: Harry?

MR. RITCHIE: And the Merolla's -- Harry Goberman.

THE COURT: That is Harold?

MR. RITCHIE: He is known as Harry.

THE COURT: It is the same person as the prosecuting witness?

MR. RITCHIE: Yes, your Honor.

Your Honor, I would like to know with respect to Mrs. Helen Goberman that she was a subpoenaed witness for the defense at the last trial.

THE COURT: She was a what?

MR. RITCHIE: Subpoenaed witness for the defense at the last trial.

THE COURT: Who called her?

MR. RITCHIE: No one called her, your Honor.

I would assume from what she told me that she has already been interviewed by Mr. Gillen --

MR. GILLEN: In keeping with that, your Honor wrote a decision that the Government had gone to the furthest limits of permissible conduct with her, recalling the 65 pages of grand jury testimony.

I have been informed that Mr. Ritchie together with Mr. McMullen, with others or another, for some two to two and a half hours last Thursday again drilled this girl.

I intend to call her as a witness. She said something about Mr. Ritchie may or may not call her as a witness. I am going to call her.

I would most respectfully request that the Court direct the government to produce for my examination any records made of the conversation with this woman this past Thursday.

In addition, therefore, I would renew my motion to dismiss this case in that the Government has affirmatively attempted to destroy the integrity of the defense.

There was another session of two to two and a half hours with this poor girl --

THE COURT: She is not a poor girl.

You mean the witness Tomasselli.

MR. GILLEN: Yes.

MR. RITCHIE: Your Honor, this poor girl was in her home, in her living room. We came at her invitation. It was myself, Miss Katz and Mr. McMullen. She told me that she had felt that I had been extremely unfair to her in the grand jury. I specifically asked her during this drilling if she felt that I was being unfair to her at that time and she stated "No."

I asked her if I had been nice to her and she stated "Yes."

There was no drilling. It was a perfectly proper interview, conducted a t the eastern end of Long Island by myself.

I realize these people have a job to do and I tried to make myself available out there. It was not any sort of star chamber inquisition. It was perfectly proper.

THE COURT: He wants to know can he have the 3500 material now.

MR. MEISELMAN: In addition to which --

AGENT MC MULLEN: I have notes of the interview

to be dictated this afternoon. It will be typewritten in a day or so.

MR. GILLEN: I would like those notes marked now.

THE COURT: They cannot, as I understand it.

MR. GILLEN: Then the notes will be destroyed according to FBI procedure.

MR. RITCHIE: I will oppose Mr. Gillen's request. I will make available to Mr. Gillen at the earliest opportunity the 302 and I will talk with Mr. McMullen about his internal reporting procedures, and his willingness to keep the notes.

I am willing to give over the --

THE COURT: I think Mr. McMullen is now advised that counsel have a specific interest in his raw notes, that they may be from his point of view inaccurate, to then dispose of them -- even though it be in the regular course of FBI procedure -- would raise a grave question and not one past on any case as far as I know.

MR. RITCHIE: Very well.

THE COURT: Let me tell you two things.

One, we have a suppression hearing in which adventitiously one of the witnesses was from Ohio. It was a Wade hearing and the Government I do not think

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had ever had an opportunity to interview this witness before, other than to take identification testimony, such as it was, at the Wade show-up.

On the very morning of the hearing, she was interviewed by an FBI man, and she was called as a witness, and for some witness or other -- the FBI man was a witness, too, because he had been part of the Wade lineup proceedings -- and was then asked whether he had an interview of one of the Wade witnesses that very morning. He said, "Yes," and he was asked to produce his raw notes, and he did, and they were as far as the defendant was concerned free-wheeling murder. It is that which the FBI foolishly destroyed, the Agent's live notes, that which the Government apologizes for in every criminal trial.

For what use it may be to you, the Coca-Cola Corporation of Georgia, the one that makes the extract -- not unknown to fame -- enforces its trademark very vigorously.

What they do is make sure that if a man goes in and orders coke or Coca-Cola, he does not get PepsiCola. They send teams around the country who walk into a bar -- two men -- and they will ask for whiskey upright and a coke chaser. Of course that makes the barkeeper's head reel, so he repeats, "You want good rye whiskey straight

up, and a Coca-Cola chaser?" And the man says, "Yes." Right, says he, and he gives him PepsiCola, of course. A careful note is made of this, and when he is not looking, they pour the chaser into a plastic bag they have. Those notes are typed that night, they are mailed down to Atlanta, clipped to them in an envelope, are the raw notes, and with them go the sample.

When the case comes to court, the whole thing is produced, and if the defendant dares to ask for the raw notes, that is the end of that defendant, because of course there is no chance of disbelieving the neatly types notes, because is the man's contemporary notes. That is the way to prepare evidence, not throwing the notes away because they have been faithfully incorporated into a 302. That's another matter.

MR. FISCHETTI: May we have them marked for identification?

THE COURT: They do not exist yet --

MR. FISCHETTI: The scratch notes.

THE COURT: They will not be destroyed.

MR. GILLEN: I would ask for --

THE COURT: That comes later.

MR. GILLEN: I still intend to call Mrs. Tomaselli. I do not know whether he will call her. I want to call her, and I want to prepare her properly.

Now, I am faced with this 65 pages of Grand Ju minutes. I am faced with a two and a half hour inter gation of a girl who maybe testified ten minutes. I honestly --

THE COURT: By the time she got off the stand, she had been on longer than ten minutes.

MR. GILLEN: Perhaps. 'Her direct was very sho

THE COURT: Her testimony might not have been long, but she was present at a critical interview in this case.

MR. GILLEN: My problem is -- I spoke to Miss Tomaselli after she came out of the Grand Jury. She couldn't remember everything said in two, two and a half hours. She doesn't know what --

THE COURT: You have those.

MR. GILLEN: This is after. This is another tw hours to two and a half hours of star chamber proceedings.

MR. RITCHIE: Miss Tomaselli had an opportunity to review her Grand Jury testimony --

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MR. GILLEN: The poor girl was shaking in her boots --

THE COURT: She wasn't any little girl; she was a practical businesswoman, and I think her title was that of office manager. If she is anything like any office manager I ever knew -- and they were all female -- I never knew of one to tremble in her boots, but I do know that strong men tremble in their boots when the office manager is around.

MR. MEISELMAN: If the Federal Bureau of Investigation was involved, I think an office manager would be in awe of the majesty --

THE COURT: I wouldn't worry about that.

Do you have the notes, Mr. McMullen?

AGENT McMULLEN: I should explain. There are two sets of notes. One is the raw set of notes of the interview in my presence with Mr. Ritchie --

THE COURT: Maybe we had better mark those separately. Mark that one 3500-1.

AGENT McMULLEN: I guess this was October 3, 1974, with Mr. Ritchie and his assistnat Miss Katz.

THE CLERK: Court's Exhibit 3500-1.

MR. McMULLEN: The next morning I was in the process of reducing my notes tc writing, to be dictated, and at that time I had a question and I called

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Miss Tomasselli on the phone and spoke to her for a very short period of time and she was not interrogated or abused at all at that time.

THE COURT: Where did you call her at?

AGENT McMULLEN: At work. I was at the office, and she was at work. She sometimes answers the phone at McNamara American Motors dealership. I reintroduced myself and told her that I had one question to ask concerning the day before. I asked the question to make sure my writing was accurate and complete and at that time I made a change on these notes, so this can be considered an original note, even though a rough draft of my original notes.

THE COURT: Yes, that would be Court's Exhibit 3500-4.

THE CLERK: So marked.

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AGENT McMULLEN: This would be October the 4th, the day after.

THE COURT: The interview at --

AGENT McMULLEN: Her home.

MR. RITCHIE: 3500-1 is a 4-page document with the backs unwritten upon.

3500-2 is a 5-page document with the backs unwritten upon and numerous scratchings out.

There are some scratchings appearing on

3500-1.

AGENT McMULLEN: Do I retain possession until I dictate them?

THE COURT: Yes, the Government is charged with the responsibility for their custody.

AGENT McMULLEN: Yes, your Honor.

THE COURT: We will have a short recess now, because at this point Mr. Shapiro's hands are about to fall off.

(Recess taken)

THE COURT: Ready?

MR. RITCHIE: Yes, your Honor.

THE COURT: Shall I bring the jury up?

MR. RITCHIE: I thought there were some unresolved problems.

THE COURT: I do not think so.

MR. GILLEN: The only unresolved problem is that Mr. Ritchie has not disclosed the secret information that he has that he claims he has no written record of or anything like that.

MR. RITCHIE: What secret information are we talking about?

MR. GILLEN: That we were talking about three-quarters of an hour ago. It has never been said by Mr. Ritchie precisely what it is that he doesn't want

to disclose.

MR. RITCHIE: I am still not clear, your Honor.

THE COURT: I think the reference is to loan transactions.

MR. GILLEN: Correct.

MR. RITCHIE: The Government has no more information whatever concerning loan transactions.

THE COURT: That is what I understood and we moved off to Mr. Meiselman's question as to whether there were other relations between Mr. Morolla and Goberman that might have a bearing on this case.

MR. GILLEN: I thought Mr. Ritchie said there was something but he had no written notes or reports on it.

MR. LEONE: Something that was told him.

MR. RITCHIE: That is correct.

THE COURT: That is what?

MR. RITCHIE: That is correct, your Honor.

THE COURT: That the Morollas --

MR. MEISELMAN: Somebody told him.

MR. LEONE: Somebody told him something earlier that he has not reduced to writing or memorandum form.

MR. RITCHIE: That is correct, your Honor.

MR. GILLEN: Which I respectfully submit could be Brady material.

THE COURT: Would that be with respect to what -- I lost the reference point.

MR. RITCHIE: To other relationships between the Gobermans and the Merolas.

THE COURT: He says, "no information about it and nothing that he intends to present about it."

MR. LEONE: Is that true?

MR. RITCHIE: I do not intend to present any evidence concerning it, no.

MS. SELTZER: I would ask Mr. Ritchie if there was any such evidence -- any written notations at any point which are no longer in existence.

In other words, that were destroyed or something like that.

MR. RITCHIE: No, your Honor.

MR. MEISELMAN: Specifically, your Honor, representing Thomas McNamara, I ask Mr. Ritchie if he has information -- whether it is reduced to writing or not -- which would indicate a relationship between the Gobermans and the Merolas exclusive of the McNamaras, then it would be exculpatory of the McNamaras --

MR. RITCHIE: I do not believe it would.

I would be willing to speak in camera with the Court.

THE COURT: I much distrust and do not like in camera proceedings. It does not seem to me that we are talking about anything unknown to the defendants and ought to be known to their counsel.

MR. RITCHIE: I believe it is known to defense counsel.

MR. LEONE: Why the secretiveness then? Why can't we come out and say it? The problem we are thinking that perhaps it is something else.

MR. RITCHIE: Different people have different recollections, and I do not believe on the basis of the evidence that has been presented to me, that it is exculpatory evidence, and for that reason I do not consider it -- I do not consider myself to be under any obligation to turn over the evidence.

I will not turn over the evidence, because I do not consider it to be exculpatory. I am willing to present it to this Court for an in camera determination.

THE COURT: I think perhaps the sensible thing is for you to discuss quietly with counsel what this is all about. They are entitled to know if there are any relationships between Mr. Goberman and the Merollas, of which Mr. McNamara -- both of

them -- and Mr. DeLiso are strangers too. Then they have got a submerged iceberg floating around and they don't know where it ends. They had just as soon know, and I can hardly blame them. If there are relationships between the Merolas and Goberman, that could explain circumstances prevailing -- whether the Merolas were present -- which were not in any way the responsibility of the McNamaras nor of DeLiso.

In other words, if Goberman when he saw the Merolas in a room, had to look at them with double vision, as it were, and with two sets of responses, his posture, his conduct, would be quite different from what it would have been had --

MR. RITCHIE: Your Honor, the only evidence that I have and that I am referring to was of an incidental nature unconnected with this transaction.

THE COURT: This again is hardly the way to proceed. Let us get the jury up and go ahead. I just give up.

Will you gentlemen move up to the other side of the courtroom so the prospective jurors can sit there.

MR. RITCHIE: If I may, before the jury comes in. I have an application.

THE COURT: Yes.

MR. RITCHIE: I'd move to sever as to John McNamara, in contemplation of calling him as an immunized government witness.

MR. WEISELMAN: I did not hear that.

MR. RITCHIE: I would move to sever as to John McNamara in contemplation of calling him as an immunized government witness.

MR. GILLEN: This is a surprise to me. I do not know what I am doing here this morning, and for that matter the last two months.

MR. RITCHIE: I reached the decision only after reinterviews with certain witnesses and it became my conclusion that unless Mr. John McNamara were called as a witness, there is a substantial possibility that certain facts which I believe to be established, will not appear to be established, that there were meetings between Harold Goberman--

MR. GILLEN: Is he going to call my client as a witness in a criminal trial when he is under indictment?

THE COURT: I do not see how you could expect that Mr. McNamara would be a witness under these circumstances.

MR. RITCHIE: He'd have to be given immunity.

I made this decision yesterday. I contacted individuals in Washington from whom, and I am at the present time preparing an immunity request.

MR. GILLEN: If my client is going to be given immunity, I am not going to fight against that.

THE COURT: Mr. Walsh, call down and tell them we will not be selecting a jury until two o'clock.

MR. GILLEN: May I confer with my co-counsel for a moment?

MR. LEONE: For more than a moment.

THE COURT: Yes.

(Pause)

MR. GILLEN: Preliminarily, it is like Alice in Wonderland. This is the first inkling I have had of it. I would accept a severance and a dismissal with prejudice against the government.

THE COURT: What I understand Mr. Ritchie to say is that he is now preparing, and he does not intend to change his mind about it --

MR. RITCHIE: I do not. Mr. Pollack was requested -- since he is familiar with the case and I am here -- to prepare an immunity request. I am sure, your Honor is familiar with the procedure used by the Department of Justice in connection with

immunities.

THE COURT: A little while ago I would have said so, but with all the Supreme Court decisions on procedure, I'd not say yes too readily.

It is under what statute?

MR. RITCHIE: 18 United States Code 6002 and 6003, your Honor.

THE COURT: This, as I understand it, is transactional and not the testimonial.

MR. RITCHIE: It is testimonial immunity. It is not transactional.

THE COURT: I see.

This is not worth a darn.

MR. GILLEN: It is worth nothing.

MR. FISCHETTI: Before we go any further, may I ask what Mr. Ritchie's proposal is again? Did I understand him to say that he is dismissing the indictment?

THE COURT: No, he is not; he is severing it, as I understand it now. He is not granting immunity to John McNamara. What he is doing is moving to sever the trial of John McNamara from the trial of the other named defendants. He intends to apply under 6002 for an order directing John McNamara to give evidence in this case against his father and

the other defendants and thereafter to proceed to trial against John McNamara on this indictment and/or for perjury to put him into jail for contempt or some combination of those on the grounds that he needs his testimony on the issue of Goberman's meetings.

By the same token, he could have done the same as to any other person claimed to have been present on both occasions.

MR. RITCHIE: Your Honor, I have in my possession a certain off-the-record interview that Mr. John McNamara had with me in the presence of his then counsel, Mr. Raymond Bergen, shortly prior to indictment, and that has been turned over to Mr. Gillen.

MR. GILLEN: We all have that from the last trial, your Honor. It was discovery material.

MR. RITCHIE: It did not come out in the last trial because, as I saw it, it was equivalent to a coerced confession, and it would be subject to exclusion.

THE COURT: It would have been suppressible?

MR. GILLEN: If it was a confession. It is a suppressible statement.

THE COURT: A suppressible statement, you

are quite right.

MR. RITCHIE: It wasn't brought out at the last trial. I conducted a number of interviews last week preparatory to this trial, and for reasons -- I do not think I have to disclose -- it appeared to me that there would remain some substantial questions in the government's case, and yet I had in my possession a statement from John McNamara that establishes that there were in fact meetings on those two occasions and that is the reason that it is at such a late date that Mr. Gillen has become aware of it and that your Honor has become aware of it. I apologize for that. When you are preparing a case you make decisions as you see them.

I would like to say, your Honor, it is the policy of the Department of Justice not to proceed to trial on individuals who have been given testimonial immunity. I do not say that I would dismiss the indictment for the simple reason that I do not have the authorization from Washington.

That is the policy, and absent a contempt situation, I see no reason why that policy won't be followed in this case.

In the case of perjury, the policy is nevertheless followed that there will be no criminal prosecution on the underlying indictment.

MR. FISCHETTI: May I be heard?

THE COURT: Yes, let me just read the statute first, if you will.

(Pause.)

I think maybe first, gentlemen, you ought to look with particularity at the section with which we are dealing, and in particular, I draw your attention to one word -- I suggest you look it over, and then I think Mr. Ritchie, if you are satisfied that this is the way to proceed, that we had better comply rather fully with that, by asking Mr. John McNamara whether he will, if called to the witness stand, testify truthfully in answers to questions directed to the areas that you are interested in.

If you remember, at the last trial, Mr. McNamara did not elect to take the witness stand, nor, I think, did any of the other defendants, and a reason for their doing so could well have been simply that to have taken the witness stand would necessarily have involved them in corroborating Mr. Goberman's testimony about their being together at certain times, and putting them in direct contradiction of what he said. Defense counsel could well think that in view of the shattered credibility of Mr. Goberman as a witness, it would be most unwise to dignify his testimony by direct contradictions

in the presence of the jury, rather than to pursue an attitude of contemptuous disdain for his testimony, so we can't be sure here that this is a case in which the failure of the defendants to testify is due to any of the conventional reasons, as I know Mr. McNamara has no criminal record ---

MR. RITCHIE: As far as I know, he does not.

THE COURT: I assume there is not that conventional reason for his not taking the witness stand.

If you will look at the precise language of this statute, you see, I would think here, that you cannot necessarily assume automatically that if Mr. McNamara were put into the position of being called as a witness by the Government, rather than appearing to defend himself against the charge of which he could appear to, an attitude of contempt would be the same.

He might be very willing to testify as a witness for the Government if -- as he must claim -- he would necessarily contradict the Government, and he contradictions would be part of the Government's case.

MR. RITCHIE: Your Honor, I am certain that there will be contradictions. However, I am certain that they -- that he will corroborate Mr. Goberman as to the fact that Mr. Goberman was beaten, assaulted --

THE COURT: I am saying to you that I think we

have to perhaps -- You'd have to satisfy me that the statutory conditions exist.

Look at that rather carefully.

If I may interrupt your reading, I assume the Attorney General has given you the appropriate authorization?

MR. RITCHIE: No, he has not. We are doing that at the present time. I have spoken to the Chief of the Criminal Division, and he has given his go-ahead. We are preparing the immunity request that will be submitted to Henry Peterson --

THE COURT: When will that be done?

MR. RITCHIE: It is being done now, your Honor.

THE COURT: Mr. Peterson is in Washington?

You have the machinery working?

MR. RITCHIE: Yes, your Honor.

THE COURT: All right, my function is merely ministerial because it says, "shall."

The statutory conditions are in effect the man has refused to be your witness, or it is self-evident that -- that you have no just expectation that he would, if requested, testify.

MR. RITCHIE: A possible answer to that is that he agreed to speak with us, in search of immunity.

THE COURT: In what?

MR. RITCHIE: In search of immunity and the other fact is that if he chooses to testify without immunity -- and I think his attorney has indicated that he will not -- then I'd be glad to accept his testimony without the grant of immunity and I think it would be better for my side and for the defendant's side.

THE COURT: If that were made a record, I would think so.

MR. FISCHETTI: May I be heard?

THE COURT: Yes.

MR. FISCHETTI: Your Honor, needless to say this comes as a shock to all defense counsel. With regard to Section 6002 and 6003, the so-called "Use of Immunity Statute."

THE COURT: I prefer to call it "Testimonial Immunity."

MR. FISCHETTI: In any event, speaking for myself and my defense of Mr. DeLiso, several problems become apparent. The first of which is as for myself and I believe other counsel have discussed the defense of this case.

Secondly --

THE COURT: Have what?

MR. FISCHETTI: Discussed the defense of this

case with Mr. Gillen. We have planned our defense. We have agreed to the cross-examination of certain witnesses. Now for the first time he may not be at my side --

THE COURT: I think we had better think of that separately.

MR. FISCHETTI: All right.

THE COURT: I think what next happened --

MR. FISCHETTI: I do not see how we can select a jury in this matter.

THE COURT: As I say, let us defer that for the moment, if you will, because I am not going to force you to trial when you are not ready for trial. I do not think I could.

If the case had not been tried once, I guess I could look at that with a fresh eye, but the case was tried once I think it would be correct to say the laboring -- somewhat to my surprise -- was that Mr. Gillen asked four times as many questions as any other counsel.

MR. FISCHETTI: Correct.

THE COURT: I think that counsel were presenting in the best sense of the word, a coordinated defense. They were not repeating once another's work and they were not unduly protracting the examination or any of

the other things and in general each counsel followed Mr. Gillen and then produced the testimony to the witness that seemed to be directed to his client.

We do have to look at the question of proceeding with the trial today and I am afraid --

MR. RITCHIE: Would it be possible to have -- I agree with defense counsel that their plans are upset. That was my purpose. I could see a short adjournment. I do not think we need an entire week.

MR. LEONE: You said we would deal with that as a separate issue. I have a few things to say and I want to reserve them.

MR. FISCHETTI: Under 6003 and the cases that preceeded Costigan against the United States at the Ninth Circuit, said the immunity afforded any witness in a trial or a Grand Jury must be coextensive with his Fifth Amendment Rights.

I am familiar with the Grand Jury proceeding where testimony immunity is given with the lack of indictment or an indictment coming after a witness testifies, but never have I seen in a case where on the eve of trial that testimony immunity would be offered or given to a witness without any indication:

1. That he would be a witness who would not testify or even another factor in this case that he

has a father who is sitting in the courtroom --

THE COURT: This seems to be my season. Last month it was a brother.

MR. FISCHETTI: Until we get the immunity order, if he gets one, I do not know how we can go any further.

MR. RITCHIE: I raised it prior to the presence of the jury in this courtroom to prevent what I thought would be -- I do not think it would be reversible error, but it would lend prejudice to the case if you have a defendant taken out from the table after the jury had seen him.

MR. LEONE: I won't comment.

MR. FISCHETTI: I would think that would be prejudicial.

MR. MEISELMAN: Somewhat.

THE COURT: That is like telling a man "Well hanging isn't so bad, they used to draw and quarter or burn."

That at least was the reason why defense counsel smiled.

MR. RITCHIE: With respectto Mr. Fischetti's recitation in the case law with respect to immunity Costigan V. United States is a Supreme Court Case, which upheld the scope of the immunity under 6002 to

6003 and said it was coextensive with the privilege against self-incrimination. That was a Supreme Court decision.

MR. FISCHETTI: I said it went to the Supreme Court from the Ninth Circuit.

MR. RITCHIE: Then I misunderstood. I heard him say that it came out of the Ninth Circuit.

THE COURT: That is what he means, but went a good deal further and came into civilized country here in the East and nevertheless went against the defendant.

MR. FISCHETTI: Find for.

THE COURT: That will do.

MR. FISCHETTI: It will, sir.

THE COURT: You see my point on that, I think you must formally and of record request Mr. John McNamara to be a witness for the Government and get from him his refusal to do so.

MR. RITCHIE: The procedure that I learned through the folklore in my office that has been filed in trial immunity situations, where there is a question of possible balk without a grant --

THE COURT: Possible.

MR. RITCHIE: -- possible refusal to testify without a grant of immunity, what is done is that the

witness is called without the presence of the jury and --

THE COURT: Certainly --

MR. RITCHIE: -- I believe that would be the appropriate procedure here.

THE COURT: You see, except we have no trial starting and perhaps it is important for all concerned that we should not have the trial actually starting. The case is here for trial. No jury has yet been selected, are we agreed on that?

MR. FISCHETTI: That is right.

THE COURT: What we next do is address ourselves solely and only to the Section 6001 and the following sections of Title 18. Is that understood by all?

MR. MEISELMAN: I trust you will forget my sitting. I have a back problem.

THE COURT: It is all right.

Mr. John McNamara, would you come forward a second.

MR. GILLEN: I would object to Mr. Ritchie posing any questions. If any questions are propounded they should be through his counsel. I am here ready to proceed to trial.

THE COURT: I think Mr. Ritchie can address the questions required to be answered by the statute

directly to you in the first instance. Will you do so, please.

MR. RITCHIE: Will your client when called to testify, John McNamara, by the Government refused to testify on the ground the way he would testify would incriminate him?

MR. GILLEN: Is that the John McNamara that is a defendant in this case, that we are presently starting a trial on?

MR. RITCHIE: It is the same John McNamara.

MR. GILLEN: May I have a moment?

THE COURT: Yes, as I understand the request that they wish his evidence, having more or less the content of the pre-indictment memorandum.

MR. RITCHIE: Yes, your Honor.

THE COURT: They wish to present to him as part of their case his testimony.

MR. GILLEN: May I have a few moments?

THE COURT: And to so present that testimony, if possible without granting him any immunity and in the hope that he will not plead the privilege against self-incrimination; is that right?

MR. RITCHIE: That's correct, your Honor.

MR. GILLEN: May I have a few moments, your Honor?

THE COURT: Yes.

(Pause.)

MR. FISCHETTI: Maybe this would be an appropriate time -- I think Mr. Gillen is going to explain to him what happens if he testifies with immunity -- the penalties of contempt, testifying against his father --

THE COURT: You think we should go over to 2:00 o'clock?

MR. FISCHETTI: I couldn't explain it in ten minutes.

THE COURT: Very well, we will go over until 2:00 o'clock at this time.

What you have in mind, will that wait until after lunch?

MR. LEONE: Yes.

(Luncheon recess taken.)

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1 AFTERNOON SESSION

THE COURT: Mr. Gillen.

MR. GILLEN: Preliminarily, your Honor, the 6002 of Title 18 United States Code states, "When a witness refuses on the basis of his privilege against self-incrimination..." it says nothing about a defendant in a pending indictment.

The posture of John Mc Namara as of this moment, of course, is that he is a defendant in the pending indictment and not in the posture of a witness that may or may not be charged at some future time with some type of misconduct. So it puts me in a quandary.

The statute precisely does not cover John McNamara, at least in just a reading. On the other hand, if the Government severed then John Mc Namara is no longer -- he is still a defendant in a pending prosecution, he is still not in the category of a witness. I do know if the Government dismissed this indictment and/or nole prossed the indictment then he is in a different posture.

As counsel, as defense counsel for John Mc Namara, having been presented with this situation, and I am being asked now to answer a question with my client who is a defendant in this indictment. To respond to a request and/or a subpoena to testify in

a case where he is one of the actual defendants, frankly, your Honor, I am not trying to be cute or anything, it has given me a headache just trying to think it out in the last hour.

THE COURT: Had you considered that point that Mr. Gillen raises?

MR. RITCHIE: Your Honor, John Mc Namara, if subpoenaed, if severed and subpoenaed, would not be a defendant in the proceeding before the Court.

THE COURT: He would be a defendant in the indictment, though severed for trial.

Now, I think the precise question is does that mean that he is not a witness in the case when you announce the wish to make him a witness in the case? That brings it sharply to a point. In other words, is the statute addressed only to the situation of people not indicted who are called?

To dress it up a little bit, what has been passing through my mind, and I dare say through counsel's mind, is that I guess you could excuse one defendant at a time here and go around the whole circle until you got every defendant into the position in which he was under an order to testify in the case of every other defendant without ever being immunized from prosecution, and simply being protected by the

3 seal placed on his actual testimony.

I suppose that Section 6002 and '3 cut across Walder and Harris, I guess, don't you -- or do you?

MR. RITCHIE: I don't want to commit the Government to a position, but I think it would be a very tight question -- since it was a Governmentally induced -- now that I think of it, your Honor, it's just like a coerced confession, really. It would be in the position of Harris.

THE COURT: Let me say this: Suppose Mr. Mc Namara is called and suppose he testified as you would wish him to, and then you would proceed on his indictment, he takes the witness stand and testified as if counsel might have hoped he'd be able to testify in that case in terms of the direct contradiction of what he said in this case; would you, under Walder & Harris, re-examined and re-applied, be able to use the testimony he gave in this trial to impeach the verity of his testimony in that other trial?

MR. RITCHIE: I believe, your Honor, that we are already in that position. We have had an off-the-record immunity discussion. We don't have the certitude of a stenographer, but other than that we are in the same position as we would be in --

THE COURT: I think that his counsel must be

aware, since they have the pre-indictment interview memorandum, as I understand it, that if Mr. Mc Namara testified he would have to face it even though it was suppressed and suppressible -- voluntarily suppressed and suppressible.

MR. GILLEN: No question of that..

MR. RITCHIE: I think they are already faced with that, the fact that he'd testify in this trial would only give us the additional witness of the stenographer, and that's the only difference it would make. I don't know whether that would be a real basis to make a decision on, the fact that there was an extra witness.

MR. FISCHETTI: Is he saying he can put in this pre-interview memorandum, whether or not Mr. Mc Namara takes the stand?

THE COURT: Oh, no, heavens no.

MR. RITCHIE: No. I am saying --

THE COURT: Only if he were to take the witness stand and testify at variance with it, then under Walder & Harris it could be used to impeach his testimony given during this trial. But that's already familiar law.

MR. GILLEN: Nobody argues with that, your Honor.

THE COURT: If we have refamiliarized ourselves with it through --

MR. FISCHETTI: My thought is the Government is utilizing this tactic to get around Bruton, your Honor, to something that concerns other defendants in this court.

MR. RITCHIE: There would be no Bruton problem because he would be on the stand, so there is no Bruton problem whatsoever.

THE COURT: You see, that is another way of handling Bruton.

MR. FISCHETTI: One that I have not seen before

THE COURT: I think that is what Mr. Fischetti is concerned with, have you finally found a way to put Bruton out of its agony?

MR. FISCHETTI: I have never seen it happen this way before, Judge, but it certainly waters it down.

MR. RITCHIE: It doesn't water Bruton down at all, your Honor, it gives the defendant his right to cross-examination, which is the only right he is guaranteed under the Constitution, not the privilege of having co-defendants testify against him.

MR. GILLEN: Do I cross-examine my own client?

6 The whole procedure to me is --

THE COURT: You see, you wouldn't be involved -

MR. GILLEN: Of course I would be here representing him, your Honor, I would have to represent his best interest. He is still under indictment, I would have to represent him.

MR. RITCHIE: What has been done, when co-defendants in court who are also defendants in the trial, but who are cooperating with the United States, is that the counsel for the defendant has been present and has been available for full consultation. I would --

MR. GILLEN: That is a different situation. We have all had that experience where for some reason a client may cooperate with the Government. We will still protect his interest. But that is a voluntary cooperation. Here we are talking about some type of coercion or whatever, with the guy still going to be tried, or still is liable for trial.

THE COURT: I don't think you could think of it actually as coercion so much as protecting the witness in testifying. He is protected from the use of his own testimony against him.

What I asked, Mr. Ritchie, is, A -- and we are clear on this -- he does not get transactional immunity because this is Section 6002 and '3 that are

7 under discussion.

Then I asked him whether he visualized that he would not -- would or would not have protection against Walder & Harris, and I think his candid answer was that he did not think so. In other words, if it became necessary to proceed against or advisable to proceed on the indictment against Mr. John Mc Namara after he testified here, his testimony during this trial could not be used, not as an admission, but if he testified as at variance with in his own trial, it could be used to impeach his testimony -- not as an admission but as an impeachment.

MR. RITCHIE: Your Honor, I don't think that there is any unfairness whatsoever to the defendant in that tactic.

THE COURT: Because he is expected to -- in order words, to put it another way, the statute does not grant him a shelter against perjury and therefore if it is used in what you might think of as a truth telling contest, and is addressed only to the truth telling, Mr. Ritchie suggests that it can't be used.

If what is being used --

MR.GILLEN: We have another instance as with Miss Thomaselli, where maybe you will have 300 pages of Grand Jury testimony with the same questions over and

8 over and over where no human being tells the same story twice, unless it's --

THE COURT: You mean sheer fatigue?

MR. GILLEN: Right. This is what I am getting at. We have the practicalities of the situation here, too.

First of all, the question directed now to Mr. McNamara through counsel, who is a defendant, is where you testify if called?

Now, even the statute here that says a witness there is a differentiation, the witness --

THE COURT: May I look at the language, gentlemen?

MR. GILLEN: Surely.

Now, if the Government, of course was to dismiss or nolle pross and then ask that question, we are in a different position. But how can I --

(Continued on next page.)

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THE COURT: I think Mr. Ritchie would think less of you if you didn't make this argument for a dismissal, but that is --

MR. GILLEN: Yes, but the Government can dismiss, your Honor.

THE COURT: Just a minute. Oh, yes, they can do many things.

MR. GILLEN: And they can do it on telephonic authorization.

THE COURT: What Mr. Ritchie thinks now is that you are negotiating his testimony out on the best terms you can manage for him --

MR. GILLEN: No sir. What I am doing now is trying to comply with the law as best as possible in the best interests of my client. I must comply with the law, as we all must.

THE COURT: I do not think that the sections limit themselves to that interpretation.

First, the problem really arises under Section 6002 rather than Section 6003, as the latter section talks in terms of an individual and not in terms of witnesses.

If you read it as you read it, or suggest that it might be read, Mr. Gillen, you would be excluding a very likely class of witnesses, that is, co-conspirators

named and unnamed who are willing to turn State's evidence.

MR. GILLEN: Willing, that's the key word.

THE COURT: Yes. But only if their testimony is not used against them. In other words, they don't want to be in the situation of having submitted to a deposition before trial.

Anyone who has been even in a civil trial knows that everybody would be a lot more comfortable if he had to testify only once and not have to charge his mind with the responsibility both for remembering what happened and also remembering what he said the last time he was questioned.

Seeking to adhere both to his recollection of the truth and to the way he phrased himself the last time he discussed it under oath, that is one of the unfairnesses of all deposition taking, I suppose. So here I should think that one would feel a little better knowing, if I have to testify twice, I would much rather testify twice to my honest recollection and be honestly cross-examined than to be faced with the semantic problem of trying to point out how consistent I have been as a witness.

So I would say here that the language of Section 6003 is really the controlling language and

that Section 6002 simply means that whenever a person having been called to be a witness refuses, or having been asked to be a witness refuses, even though he may be a defendant, because he is an individual -- see, it says in 6003, "A, in the case of any individual who has been or may be called to testify at any proceeding before or ancillary to a Court of the United States, the District Court shall issue, in accordance with Subsection B, on request of the United States Attorney, an order requiring such individual to give testimony, and then the United States Attorney may, with the approval of the Attorney General, request an order under Subsection A."

And then the reference back is the reference to the sterilizing effect of 6002 on the testimony, which --

MR. GILLEN: If he was a defendant by himself, the Government would be getting an EBT, then their investigation could be different; everything could become different in the case. It is an examination before trial.

Can they do this if John McNamara was the only defendant in this case?

MR. RITCHIE: Your Honor, if the Government conducts an investigation as the result of --

THE COURT: It wouldn't work, Mr. Gillen?

MR. GILLEN: If it worked here why wouldn't it work, because --

THE COURT: Because they would never get the trial started if he was the only defendant.

MR. GILLEN: If he was the only defendant, they could use this section, put him into a grand jury, get complete discovery --

THE COURT: I see what you mean.

MR. GILLEN: Yes, get complete discovery and then tailor their investigation --

THE COURT: Don't suggest that to Mr. Ritchie; he'll try it next month.

MR. GILLEN: But isn't the Government then examining before trial in a criminal case in contravention of the Fifth Amendment?

MR. RITCHIE: If your Honor grants the severance, it would be a matter that could betaken up at the time of any possible trial of John McNamara.

MR. GILLEN: EXcept that I am ready to go to trial today, your Honor.

THE COURT: What I want to kn ow is, the statute being what it is, let me put it this way, unless the conditions of Section 6003 exist, and the Government means to and does move forward under it, there would be no possible ground for granting the severance and a

delay of the trial.

MR. RITCHIE: I don't understand your Honor.

THE COURT: I say, no grounds for a severance has been suggested other than the wish of the Government to proceed under Section 6002 and 3.

MR. RITCHIE: That's correct, your Honor. To use John McNamara as a witness with the requisite immunity.

THE COURT: That's right. But I certainly will not sever to give you an opportunity to shop around with the Attorney General to do that.

MR. RITCHIE: I don't understand your Honor.

THE COURT: That is a consequence, really -- in other words, you asked Mr. McNamara to testify, he either says he will or he won't. If you have to resort to this and at that time move to sever, and the severance would be granted --

MR. RITCHIE: Does your Honor mean to proceed to trial with John McNamara in?

THE COURT: I will say it again. You are not going to sever and possibly run into the certainty of at least a short delay until commencement of this trial to find that there is never going to be any Section 6002, 6003 proceeding because if there isn't going to be one, if no order is made under Section 6003,

we are to go to trial right now and get the jury panel up.

MR. RITCHIE: So what does your Honor propose to do?

THE COURT: I want to find out from you whether you are now applying, and have laid a foundation for the application of an order under 6003?

MR. RITCHIE: Your Honor, what I have done was yesterday I contacted --

THE COURT: I want to know today now.

MR. RITCHIE: We have partially prepared the immunity request. I have to get involved in it because there is certain information that Mr. Pollack is not familiar with that I will have to sit down and write out. It will then be typed up, transmitted to Washington and it will go --

THE COURT: So we are days away from that.

MR. RITCHIE: I think we can do it in a day, your Honor.

THE COURT: Why should I be -- why in the world don't we go ahead with the trial, I just don't believe this.

MR. RITCHIE: Your Honor, the reason I brought it up before I got the immunity was to prevent the posture of having a defendant rise from that table,

exit the Courtroom and reappear as a Government witness. I don't have the immunity.

THE COURT: I don't think you have a thing. You haven't even asked Mr. McNamara what his wish is. Perhaps he is perfectly prepared to go to trial, to testify if called as a witness, without any sterilization of his testimony.

MR. RITCHIE: Your Honor, I can't call him to the witness stand if he goes on trial.

THE COURT: But you can find out now whether he would testify if called. But he may be ready, willing and able to, then you can proceed to trial with that assurance.

MR. RITCHIE: Your Honor, this would presuppose a severance of him, at any rate.

THE COURT: The what?

MR. RITCHIE: This would presuppose a severance of him, at any rate.

THE COURT: It would not. He would be testifying in the expectation that that would be the end of your case.

MR. RITCHIE: The Government cannot call a sitting defendant to the witness stand.

THE COURT: He can insist on taking it.

MR. RITCHIE: There is no doubt about that.

THE COURT: Why can't he take it on your call if you ask him?

MR. RITCHIE: Because there is a statute that says I can't call him.

THE COURT: What statute.

MR. RITCHIE: I don't know the citation now. I can get it. There is a statutory prohibition against even calling a defendant to the witness stand.

THE COURT: Only if you have reason to believe that it would be regarded as a grandstand play, which he couldn't go along with because he has a Fifth Amendment right.

I would assume that the reason for any such rule would be that that would simply be a technique for forcing defendants to take the Fifth Amendment in the presence of the jury.

MR. RITCHIE: That's right, your Honor.

THE COURT: All right.

But if he doesn't take it, if he says "I am not going to take it. I am ready, willing and anxious to testify at the earliest possible moment. You can call me as your first witness." We will then have this case over in no time at all.

MR. RITCHIE: Can I speak with Mr. Gillen, your Honor?

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THE COURT: Certainly.

(Recess.)

(Continued on next page.)

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MR. RITCHIE: Mr. Gillen will be in in a moment, your HOnor.

THE COURT: Very well. I am sorry to cause you so much trouble.

MR. RITCHIE: I apologize to the Court for springing this, but it resulted from a final change in the plans.

THE COURT: That is the one thing about time, you can either hurry up or just keep going, one second per second all the time.

MR. GILLEN: Your Honor --

THE COURT: Just a minute. John Leone is coming in.

MR. GILLEN: Yes, your Honor.

MR.MEISELMAN: Be right in, your Honor.

MR. GILLEN: Your Honor, I will answer the question, but I'd like to make my position quite clear on the record before I do so.

John McNamara, as we all know, is a defendant in this case. He is now being asked through counsel, if called by the Government, would he testify? I have said to the Court that my posture is to defend John McNamara, period.

The Government has not made clear what their intentions would be in the future, after the trial of

this action.

Query, would they proceed against John McNamara, in any event?

Mr. Ritchie, I think, has said what the Department policy -- I don't know. I don't want to --

THE COURT: I do not think he quite said that it is the policy, but the practice, was it?

MR. RITCHIE: The practice is not to proceed, your Honor. But I can't -- can't state at this time that the Government would dismiss the case against John McNamara.

THE COURT: Cannot undertake it, is that right?

MR. RITCHIE: That's correct.

THE COURT: He could not undertake to dismiss.

MR. GILLEN: No. I know he cannot as an Assistant, but I do know --

THE COURT: No.

MR. GILLEN: There is a procedure where telephonically the Department is contacted and made known to them whether the proceedings are, and you can get telephonic authorization to dismiss a case, and then you follow up with your documents. I think it's a form 900, if I am not mistaken.

MR. RITCHIE: Correct.

MR. GILLEN: That is separate and distinct from

the immunity procedures under Section 6003.

Now, one is a nolle prosequi, and still the Government, at any time, from what I could see, would have the right to do this under 6003. One is really not hinging on the other, so to speak.

I've made quite clear to Mr. Ritchie, we are not bargaining, vis-a-vis cooperating witness, in that context. That is not what is occurring here. I want to make that quite clear, your Honor. That's not the situation.

Now, if the Government, through Mr. Ritchie, authorized the dismissal of the case, then, of course, I'm then representing an individual that had been charged, may again be charged in the future, for all I know, in another Grand Jury. I don't know.

But as an attorney, I can then answer a question very easily.

By the same token, as a lawyer, I'm being offered a severance, and there are practical effects of severance, and I'm not unaware of the practical effects of a severance in a case of this type. It's been tried once. It's going to be tried again, and if there is a hung jury again, whether it's going to be tried again, I don't know. That's prosecutorial discretion.

So I am really on the horns of a dilemma. That's

why I wanted to make my position quite clear.

I see no reason, if the Government policy is not to proceed, why they don't say, and get the authority, and say, No, John McNamara is going to be dismissed, he's out of this case.

Now, counselor, let's deal at arm's length on the law, and under the statutes and decisions that exist.

I have no problem with that.

In short, I don't know whether Mr. Ritchie could get on the horn, so to speak, call Washington, and find out what their posture is on this, and that could be done within an hour's time.

As a lawyer, that would certainly at least then I can -- I can get on to solid ground, again, and start thinking like a lawyer. It's very difficult in this situation, for the reason I said before. My client, in effect, is being subjected to an examination before trial.

True, his testimony could not be used in the case in chief.

THE COURT: I think the -- That is something you have to face independently.

MR. GILLEN: Yes.

THE COURT: Because Mr. Ritchie has indicated

that he means to go ahead and get the order.

MR. GILLEN: Correct.

THE COURT: He does not need the order, if, without any change in anything, Mr. McNamara is able to assure him now that if called as a witness, he will not assert the privilege, and will gladly tell the truth, if called as a witness by the Government.

That is all I think Mr. Ritchie wants to know, because if Mr. McNamara is prepared to do those things, there is, of course, no necessity for a resort to 6002, 6003, or any other statute.

MR. GILLEN: I think what is disturbing me, your Honor, what I can't get straight in my own mind, is that he is a defendant in the case. I never had the experience --

THE COURT: I will go over it with you carefully again.

MR. GILLEN: Yes.

THE COURT: There is such a thing as a defendant who pleads Not Guilty for one simple reason, that he is Not Guilty. All that is necessary to enable him to pursuade a jury of that is to be given the opportunity to testify, and the sooner the better.

All right. Now, for all that we know here, that is precisely Mr. McNamara's posture.

His Fifth Amendment situation is a separate one. There are many reasons for not wishing to testify, even if one is completely innocent of any qrongdoing.

We all know that, from what Mr. Griswold has explained to us, and a dozen other learned writers, that you can get so hopelessly involved in problem of defense, that you will wish you had never spoken, because your acquittal may be years down the road.

Whereas, if you chose not to speak, no one could proceed against you at all.

So that the plea of the Fifth Amendment is not the equivalent of a plea of Guilty. It is a recognition, the situation is not one that lends itself to disposition by your words.

However, if the Government will call you as its witness, your situation is somewhat different. Now your words do not become something which the Government is free to attack. They are its case, and if you are innocent, that is its case, and it cannot survive the motion.

MR. GILLEN: Your Honor, it's not that simple, in all due respect to the Court, because we have a trial here where there were many witnesses called.

THE COURT: That is the question. He does not have to take the witness stand at the call of the

Government at any time.

MR. GILLEN: The answer is, He will not.

THE COURT: All right.

Does that give you what you want to know? I think it gives you what you require under the statute.

MR. RITCHIE: I believe it does, your Honor.

THE COURT: All right. Now, when can you get the Order?

MR. RITCHIE: Well, as soon as I'm able to prepare it. It will be typed and sent down to Washington, your Honor.

THE COURT: When does that mean?

MR. RITCHIE: Well, when I'm out of this courtroom, I'll be doing that.

THE COURT: I know, but when does it mean in terms of your being ready to return here and reply?

MR. RITCHIE: Your Honor, I believe I can get an answer tomorrow.

THE COURT: You will be here tomorrow? Because we have to make a schedule now.

MR. RITCHIE: Yes, your Honor. I'm willing -- I believe that we could probably have a schedule set up to begin trial by Thursday, at the latest.

THE COURT: Please get the trial schedule (Addressing Law Clerk.)

MR. RITCHIE: Giving myself a day's leeway there. Wednesday, your Honor, or Thursday.

THE COURT: Excuse me?

MR. RITCHIE: Wednesday or Thursday, I believe that we could commence trial.

THE COURT: Well, see, I forget how long it took us to try the case last time. I think the Law Clerk, who will be back --

MR. GILLEN: Thirteen or fourteen trial days.

AGENT MC MULLEN: Fourteen trial days.

THE COURT: Trial days?

AGENT MC MULLEN: It began the seventh of January, and ended January the twenty-fourth.

THE COURT: Did we have a couple of days we had to take off for some reason or other?

MR. GILLEN: Yes. Mr. Pollock had to go down to New Orleans.

THE COURT: Yes.

MR. RITCHIE: That was a Wednesday, and we had two Fridays.

THE COURT: What was it, twelve trial days, or something of that sort?

MR. RITCHIE: Your Honor, it was only ten to twelve, at the most.

THE COURT: Something like that. We had set

aside ten trial days, plus having a rather elastic schedule for the immediately following week. That is to say, we put in a couple of civil cases that we felt, a, might settle and b, if the worst came to the worst, we could just remind that they were, after all, only civil cases, and could be kicked over.

Beyond that, you see, we had planned to go into another re-trial in the Jacobson case, which has now managed to get itself solidly into trouble.

So I don't quite know where we would be.

Excuse me one second, please.

We cannot possibly know, certainly, until tomorrow earliest, whether life is liveable at all, because we also have a jail case that -- the Lockhead case. Is that yours?

MR. RITCHIE: No, it isn't, your Honor.

Jacobson is from my office, though.

THE COURT: Jacobson is in trouble.

MR. RITCHIE: I wasn't aware of that, your Honor.

THE COURT: There is publicity trouble.

I do not know what I am going to do now.

MR. GILLEN: I really don't know my own posture at this point. Am I severed from this trial at this point?

THE COURT: Not until this Order is authorized

and signed.

MR. LEONE: If it is.

MR. RITCHIE: If it is. Then you're in the case.

MR. MEISELMAN: If we wait until that moment, and then your Honor directs us to trial, it places us in a --

THE COURT: I think I can say to you, in all candor, that I would not feel free to. I think it would be a question of how much time we would be talking about on what Mr. Ritchie has suggested as the defraction of a week, would survive.

MS. SELTZER: Fraction of a week?

THE COURT: He said Thursday.

MR. RITCHIE: Is this a fraction of the week beyond -- beyond the period of time to get the Immunity Order signed?

THE COURT: Yes. Of course they cannot be ready overnight.

MR. RITCHIE: All right, your Honor.

THE COURT: Besides that, you see, they have to keep their witnesses and everything lined up on the assumption you may not get the Order, if Washington refuses to go along.

MR. RITCHIE: Yes, your Honor.

THE COURT: And then we will just have to pull

11 everything together and get started. Right?

MR. RITCHIE: Well, your Honor, we should know by tomorrow, by Wednesday at the latest. That's why I said Thursday. That was why I said either Wednesday or Thursday. By Wednesday, at the latest, your Honor.

It shouldn't take anything more than a day.

THE COURT: Can't you have someone take the darned letter down to Washington this afternoon?

MR. RITCHIE: Your HOnor, that doesn't speed anything up. It will be magnafaxed down in Washington. I'll have to be on the phone, pushing things through. That's a very big building in the Department of Justice. A lot of people in it. That will be the only slowdown.

THE COURT: I think if we -- if we were going to be realistic with you, we would be talking in terms of either -- of November 18th.

MR. GILLEN: November 18th, your Honor, I have a case before Judge Grizzay, set down a long time ago.

THE COURT: You won't be here.

MR. GILLEN: As far as -- We're not sure of that right now.

THE COURT: Well, this is on the assumption that Mr. Ritchie is going to find out as quickly as is human possible what the Government's course here is.

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MR. FISCHETTI: Your Honor, before your Honor set that matter down, this matter down for November 18, may I, for purposes of the record, inform the Court that Mr. DeLiso is ready for trial as of this moment and that we did waive the 90 day rule, I believe, as it's now called on retrial.

THE COURT: Six months.

MR. FISCHETTI: I think it's 90 days on a re-trial. For this date and that, your Honor, I believe, I am not in error, has sent certificates of engage-ment to all counsel, including myself, and we are present in Court today and I stand ready to commence the trial, United States of America against John DeLiso, as of this moment. Should --

THE COURT: Wait. I am not so sure that you are if the Government gets this order excusing Mr. McNamara's attendance in somewhat changing the shape of the Government's case.

MR. FISCHETTI: I was just going to speak to that, your Honor, by saying that the Government put us in the posture of coming forth just prior to the selection of the jury and announcing this decision.

I believe the Court is well aware that Mr. Ritchie participated in the first trial and that it was his case from the first trial until today.

And yet, we're met with this announcement this morning prior to the selection of the jury.

So I think that the ball is squarely in his court, sir, that he knew or should have known that this was about to commence, rather than bring it to our attention this morning.

When the immunity order, if such an order is secured by Mr. Ritchie, and Mr. McNamara is then severed, I may at that time have an additional motion to bring before the Court. Perhaps for a continuance because of tactics. Perhaps for a dismissal under Hoffa or Lusterino. Because of a conversation --

THE COURT: Which one is that?

MR. FISCHETTI: Lusterino or Hoffa, your Honor. I haven't read the cases recently but they speak to the issue of having a defendant on trial and then called as a witness by the Government, having conversations of defense tactics prior to his being called.

Mr. Gillen, as the Court might be aware, and myself, and indeed all other counsel, have discussed this matter right up until the moment of selection of this jury, and I believe that Mr. Ritchie, for whatever purpose he's doing it, knew of this or should have known of it before this morning.

So to protect the record I merely say that I am

ready for trial, as of this moment, and I am not agreeing to any further delay on behalf of Mr. DeLiso, at this point, without any immunity order being secured by Mr. Ritchie.

MR. MEISELMAN: I'll adopt that motion, your Honor, in behalf of the defendant Thomas McNamara.

MS. SELTZER: I would join also, your Honor.

MR. LEONE: Join in the motion.

MR. RITCHIE: Your Honor, the Government's request for an adjournment is two days and two days only.

MR. FISCHETTI: I oppose, sir, based on the reason stated.

MR. RITCHIE: It is not a request for an adjournment for any substantial length of time. I'll be ready to proceed to trial as soon as that immunity is acquired. If it's denied to me, I'll be ready to proceed to trial at that very moment.

THE COURT: If what?

MR.RITCHIE: At that very moment. I'm ready to proceed to trial.

THE COURT: The only reason for not starting on the selection of the jury immediately is that, as I understand, Mr. Ritchie has unequivocally made up his mind that he is going to pursue this course to the

full extent permitted by the Attorney General, that it's only in the unlikely circumstance that he -- I assume unlikely circumstance that the Attorney General refuses his cooperation, that he will revert to the posture in which the case stands at this moment. Is that right, Mr. Ritchie?

MR. RITCHIE: That's correct, your Honor.

THE COURT: Now, in those circumstances, what I am faced with is, as a practical matter, is that having sat through the first trial, is a recognition that the whole plan of the conduct of the trial and defense will have to be completely revised and that that is not the work of a moment. How long it will take, I do not know.

But I take it, it means that there is no use trying to discuss it in the abstract.

I am afraid I must tell you, Mr. Ritchie, that if the case is postponed to Wednesday, you will have to take your own chances on other consequences, if the immunity order is signed.

MR. RITCHIE: I don't understand your Honor.

THE COURT: Well, counsel will then say that it will take us a reasonable period of time to get ready.

MR. RITCHIE: Your Honor, I had indicated a

readiness to consent to a short adjournment in realization of that factor. I think that preliminary --

THE COURT: I will then say also that we will reserve the right, if no trial time is immediately made available to us, at what amounts to a date of our selection, that each of us reserves the right to resort to his prompt disposition rights, if any. I think those are the things we will have to face together.

MR. RITCHIE: Yes, your Honor.

THE COURT: All right.

MR. GILLEN: Thank you, your Honor.

MR. LEONE: 10 o'clock, your Honor?

THE COURT: Wednesday at 10. Is that right?

MR. RITCHIE: Yes, your Honor.

MR. LEONE: Are we --

THE CLERK: Wednesdayat 10?

MR. RITCHIE: Yes.

MR. LEONE: Are we safe to represent that we're actually still engaged on trial?

THE COURT: Yes. In my opinion, we are.

MR. LEONE: All right.

THE COURT: The only reason for not actually starting the selection of a jury at this moment is that we might get entangled in double jeopardy problems, if we did. That is the only reason for not doing it.

MR. MEISELMAN: I have another problem108

MR. RITCHIE: Your Honor, I would like to know that the Government had stated originally that it was prepared to sever Mr. McNamara, John McNamara, and proceed to trial before the immunity was acquired. It was your Honor's suggestion, in view of the regulations of his calendar, as is properly your function, that the Government wait and have the two day adjournment, and I --

THE COURT: I'm sorry?

MR. RITCHIE: Your Honor, the Government originally proposed a severance and then to seek the grant of immunity, and it was ready to proceed to trial. It was your Honor's suggestion that because of -- for reasons of your Honor's own, that no severance would be granted unless and until an immunity were granted, and I would like to state that the Government's position --

THE COURT: All right.

MR. GILLEN: I'd agree to a severance now, your Honor.

MR. FISCHETTI: I am ready to start.

THE COURT: Wait a minute.

MR. GILLEN: I'd agree to the severance.

THE COURT: Right now?

MR. GILLEN: Sure.

THE COURT: At this instant?

MR. GILLEN: Sure. I just did it. I'll do it again. Right now.

THE COURT: How about the rest of you? Are you ready for trial?

MR. LEONE: Is the motion granted? What happened to the motion?

THE COURT: How about the rest of you?

MR. LEONE: Yes, I suppose so.

MR. MEISELMAN: Until your Honor makes the decision, I don't know what posture I'm in.

MR. LEONE: Of course.

MR. MEISELMAN: I have subpoenaes outstanding.

THE COURT: What is that?

MR. LEONE: There is a motion to sever and there is a -- counsel consents. I'm not trying to be cute but we have to know whether or not that motion is granted.

THE COURT: Well, the motion will not be granted except for the purpose, you see, of proceeding to trial, because it wouldn't be fair.

MR. MEISELMAN: Then I would say, your Honor, that we are ready to proceed and we have been. I have subpoenaes outstanding. I was going to ask your Honor's

direction, to advise the people served with subpoenaes that they are subject tothe subpoena, and that throws all my subpoenaes off kilter. I don't know where I am with my witnesses.

MR. RITCHIE: Then we can proceed to trial today.

MS. SELTZER: Can we have a moment, your Honor.

THE COURT: Yes. We can go right ahead then.

MS. SELTZER: Your Honor, I don't think that I am ready for trial.

MR. GILLEN: Wait. Your Honor, may we have just a five-minute break? I hate to ask, but I think there is something I should discuss with counsel, okay?

THE COURT: Wait now. Let's see if we know what we are talking about here.

Mr. Ritchie moved for a severance of the trial.

MR. GILLEN: I agreed to it.

THE COURT: A s to the defendant McNamara, and Mr. Gillen assented to that.

MR. GILLEN: That's correct.

THE COURT: Unqualified?

MR. GILLEN: Unqualified.

THE COURT: I have not yet granted it because it is a motion addressed to the discretion of the Court.

MR. GILLEN: Yes sir.

THE COURT: I will not grant it if it means that counsel in the interests of their clients feel that they have to apply for an adjournment, because really at this moment there has been no change in the legal situation. I would not grant the motion because there isn't any reason for it, other superficially than to put the remaining defendants in the impossible position of going to trial in stanta, without leading counsel. Put it in words of one syllable.

If you people are prepared to go to trial in stanta, without Mr. Gillen's leadership in the trial -- I am not talking about qualitative leadership. I am talking about the fact that he was leading counsel. He led off the main version of the cross-examination. It was his. I assume the witness sheets were largely his.

So that is all I am talking about.

MS. SELTZER: Your Honor --

MR. FISCHETTI: Let's discuss it.

MR. LEONE: Yes.

THE COURT: All right. Five minutes.

MR. RITCHIE: Your Honor, may I step outside.

THE COURT: Surely.

(Recess taken.)

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MR. FISCHETTI: On behalf of the defendant John DeLiso, if your Honor feels constrained to grant the motion made by Mr. Ritchie to sever Mr. John McNamara, I am ready for trial.

MS. SELTZER: I am ready for trial on behalf of Alphonse M. Merolla.

MR. MEISELMAN: May I state the same?

MR. LEONE: May I state the same, we are ready to proceed.

THE COURT: Is there any objection to the Government's motion to sever?

MR. FISCHETTI: No objection.

MR. GILLEN: NO objection, your Honor.

MR. MEISELMAN: No sir.

MR. LEONE: No objection.

MS. SELTZER: I have no objection.

THE COURT: Motion granted.

Get the jury up.

MR. GILLEN: I have been requested by counsel to assist in the defense of Thomas McNamara and I have consented to do so. We want to let that be known to the Court. I have discussed it with Mr. John McNamara and Mr. Meiselman.

MR. LEONE: This way we are ready to proceed without any further delay.

THE COURT: Very well.

MR. RITCHIE: I would raise the question of conflict of interests.

MR. GILLEN: May Mr. John McNamara be excused?

THE COURT: Yes.

MR. RITCHIE: I note that there is a conflict of interest now present.

Mr. Gillen, who will be representing Thomas McNamara, will be in conflict in that a witness against Thomas McNamara will be testifying for the Government who is a client of his and who remains a client of his. I believe there is a conflict of interest here.

MR. MEISELMAN: May I state for the record, in preparation of this case, I have fully conversed with Mr. Gillen in the way this matter was to be presented. We had anticipated various portions of the testimony which we would each direct our cross-examination to. We are ready, Mr. Gillen has no conflict. This is a father and son relationship. I think Mr. Ritchie is presupposing what the testimony will be.

THE COURT: I think Mr. Ritchie's point is that there may be confidences that Mr. Gillen or you have separately received from your clients which may result in damage to the other lawyers' client and that

Mr. Gillen whose responsibility heretofore has been to serve the interest of Mr. John McNamara, even if that meant a disservice to the interests of Thomas McNamara, it is now required -- while still representing John McNamara who is under indictment -- to devote himself to the interest of Mr. Thomas McNamara.

MR. MEISELMAN: The conflict if any would be to the detriment of the clients. Mr. Thomas McNamara consents to it.

I as his counsel consent.

THE COURT: You may ask Mr. Thomas McNamara, who is of age, whether he does or does not.

MR. MEISELMAN: Have you heard the discussion between the bench and counsel?

DEFENDANT THOMAS MC NAMARA: Yes.

MR. MEISELMAN: Do you consent to having Mr. Gillen act as your co-counsel with me in your defense of this matter?

DEFENDANT THOMAS MC NAMARA: Yes.

MR. RITCHIE: Your Honor, there is still a problem of John McNamara. I wasn't prepared to meet this. May I have half an hour?

THE COURT: No.

MR. RITCHIE: Fifteen minutes?

THE COURT: This is a situation of your creation,

Mr. Ritchie. I am afraid that you will have to role with the punches.

MR. RITCHIE: Yes, your Honor.

I do believe there is still a conflict of interests whether Mr. Thomas McNamara waives it or not. There is still the question --

THE COURT: Conflict of interests might mean that Mr. Gillen would have to withdraw from his representation of Thomas McNamara from here on out to make sure he betrays no interest --

MR. GILLEN: If it comes to that, that is precisely what I will do.

THE COURT: Have defense counsel in this case, as far as they know, been cooperating fully with each other in the preparation of the defense, both of John McNamara and of Thomas McNamara?

MS. SELTZER: Yes, your Honor.

MR. MEISELMAN: Yes, your Honor.

THE COURT: Do you gentlemen know of anything of any kind, character or description that you have withheld from the knowledge of your client, of co-counsel, of your co-defendant McNamara?

MR. GILLEN: No, sir.

MR. MEISELMAN: I can say honestly, no sir.

THE COURT: I think that the area in which the

conflict of interest in a case of this kind is likely to arise is in the actual presentation of evidence and argument and in the contrasts that can arise in the Courtroom and in the eyes of the jury, particularly when one lawyer undertakes to represent two clients and in making his opening or closing argument or in the course of his cross-examination necessarily contrasts the situations of his two clients, invariably presenting one as lighter or darker than the other. That's the normal area of conflict in such a case as this. In the odd situation here produced, that is not possible. I do not honestly see a conflict of interest situation here, Mr. Ritchie.

MR. RITCHIE: Your Honor, for example if he is going to be called as a witness by the Government and he is being represented by Mr. Michael Gillen, it would interfere with the Government's right to prepare the witness.

THE COURT: As to what?

MR. RITCHIE: To prepare Mr. John McNamara as a witness.

MR. GILLEN: Your Honor, the Government has no right to talk to John McNamara except under legal process. He is not going to sit and talk with Mr. Ritchie.

MR. RITCHIE: I think there the conflict is apparent.

MR. MEISELMAN: It is not apparent at all.

MR. RITCHIE: If he was not representing Thomas McNamara, another attorney might perhaps allow him to be interviewed by the Government.

MR. GILLEN: He is still under oath.

MR. RITCHIE: Your Honor, another attorney might and I think there's got to be the withdrawal of Mr. Gillen on behalf of one of the two defendants he is now representing.

THE COURT: I will reserve decision on that, but I am almost certain that I would not at the Government's instance take that position.

MR. RITCHIE: Yes, your Honor.

(Whereupon, a prospective jury panel was impanelled and sworn.)

* * * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- : 73-CR-442

JOHN DE LISO, THOMAS MC NAMARA, ALPHONSE MEROLLA and ALPHONSE M. MEROLLA, :

Defendants. :

----------x

United States Courthouse
Brooklyn, New York

October 8, 1974
1:30 o'clock p.m.

B e f o r e :

HONORABLE JOHN F. DOOLING, JR., U.S.D.J.

HENRY SHAPIRO
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: DAVID RITCHIE, ESQ.
-and-
MARSHA KATZ, ESQ.
Special Attorneys, Task Force

RONALD FISCHETTI, ESQ.
Attorney for Defendant DeLiso

LEONARD J. MEISELMAN, ESQ.
-and-
MICHAEL GILLEN, ESQ.
Attorneys for Defendant Thomas McNamara

MS. MARION SELTZER
LEGAL AID SOCIETY
Attorney for Defendant A.M. Merolla

JOHN LEONE, ESQ.
Attorney for Defendant A. Merolla

Also present:

RICHARD MC MULLEN
Special Agent, FBI

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(Whereupon, a jury was duly impanelled and Sworn.)

MR. FISCHETTI: May we have your ruling that all of us join in each others' objections and motions, unless counsel specifically disaffirms?

THE COURT: Unless they disclaim, yes.

Agreed?

MR. LEONE: Yes.

MS. SELTZER: Yes.

* * *

MR. RITCHIE: Your Honor, may I proceed?

THE COURT: Yes, Mr. Ritchie.

MR. RITCHIE: May it please the Court, Ms. Seltzer, Mr. Fischetti, Mr. Gillen, Mr. Meiselman, Mr. Leone, Forelady Kirk, and Ladies and Gentlemen of the Jury:

As you know, my name is David Ritchie. I am the attorney for the United States in the prosecution of this case. My co-counsel in this case is Marsha Katz, another Government attorney. Assisting the the presentation of the case Richard McMullen, an Agent of the Federal Bureau of Investigation.

It is now my duty under the law, and my privilege, to present to you what is called an Opening. The purpose of this opening is -- because the Government has the entire burden of proof in this case -- is to pre-

sent to you what the Government intends to prove through the mouths of its witnesses. It is nothing more than a preview of the evidence, and it is one of the two opportunities that I have to directly address you, the jury.

I'd like to say that what I say here in this courtroom is not evidence. What any of the attorneys in this courtroom say is not evidence. The evidence for you Ladies and Gentlemen to consider is the evidence from that witness stand.-- the evidence of witnesses. That is the first type of evidence, the testimony. The second type of evidence is the Exhibits. The Government intends to introduce into evidence certain Exhibits.

The third type of possible testimony is if per chance there is an agreement that a certain fact is so, then that becomes evidence, too.

Now, I mentioned that the Government would prove its case through its case through its witnesses. You have already heard of one of the Government witnesses. His name is Harold Goberman. He is the man from whom the Government alleges certain property was extorted.

Now, Mr. Goberman, in testifying, will relate to you some of his background. He will relate to you the fact that he is a twice-convicted felon, that he

has on innumerable occasions used aliases -- a large number -- and that he has been associated in the past with people that he terms "racketeers."

I would like to note that Mr. Harold Goberman is one of the Government witnesses, and there will be many others.

Before I tell you what the Government will prove, I'd like to read what the Government must prove -- what the Government must prove is the charge in this indictment. The charge in the Indictment has already been read to you once by the Judge, but since it is what the Government intends to prove, I will read it as part of my Opening.

In fairness to the defendants, I'd like to note that that Indictment -- that Charge is nothing more than a Charge, nothing more than an accusation, it doesn't constitute one shred of proof, one shred of evidence. It is not what has been proven, but what must be proved by the Government.

I will now read the Indictment. The Indictment is captioned as follows:

"The United States of America versus John DeLiso, Thomas McNamara, Alphonse M. Merolla, and Alphonse Merolla."

Before I read the Indictment, let me note in the course of my Opening, I will not refer to Alphonse M. Merolla by that name. I will refer to him as Al Merolla, because that's the way my witnesses -- the witnesses for the Government will refer to Alphonse M. Merolla, as Al Merolla.

With respect to the other Alphonse Merolla, for whom no middle initial is given in the Indictment, I will refer to him -- and I mean no disrespect to him -- as "Fat Nicky." That's the way the Government witnesses will refer to him in their testimony.

Now, the Indictment reads that the Grand Jury charges:

"Count One.

"1. That from one or about March 1, 1972, up to and including June 28th, 1972, both dates being approximate and inclusive, within the Eastern District of New York, HarMac Contracting Corporation was engaged in the construction and preparation for construction of a building on behalf of the defendant, Thomas McNamara, and McNamara Re New Cars, Incorporated, which building was to be utilized in connection with the service and sale of new automobiles, parts of which were to be manufactured in other states, and transported in

interstate commerce to the said building, and that for the purpose of performing the aforesaid building construction, the HarMac Contruction Corporation transported, moved and caused to be moved articles, commodities and materials, supplies, men and machinery in interstate commerce between various parts of the United States and the State of New York to the site of said building construction within the State of New York."

That lays out the area that we are dealing with, the interstate commerce.

"Paragraph Two. At all times pertinent thereto, Harold Goberman was the sole shareholder and the President of the HarMac Contracting Corporation, and a party in the contract with McNamara Re New Cars, Incorporated, for the construction of the building mentioned in Paragraph One, whose interests in and under the contract were assigned to the HarMac Contracting Corporation."

Mr. Goberman will testify that he was the sole shareholder. He will testify that he signed the contract individually, but then he had a corporation formed, and under the contract, he was allowed to assign its rights, which means, transfer all of his rights to the corporation. That corporation was called HarMac Contracting Corporation.

"Paragraph Three. From on or about June 1, 1972, up to and including the date of the filing of this Indictment, both dates being approximate and inclusive, in the Eastern District of New York, the defendant John DeLiso, the defendant John McNamara, the defendant Thomas McNamara, the defendant Alphonse M. Merolla" -- that's Al Merolla -- "and the defendant Alphonse Merolla" -- that's the man I will refer to as "Pat Nicky" -- unlawfully, willfully, and knowingly combined, conspired, confederated, and agreed together and with one another, and with diverse other people to the Grand Jury unknown, to obstruct, delay and affect commerce and the movement of articles and commodities in such commerce by extortion, as that term is defined in Section 1951 of Title 18, United States Code."

That sets forth the facts that the Government is charging these individuals, with Conspiracy to obstruct and delay and affect commerce through extortion.

"Paragraph Four. It was a part of the said Conspiracy that the defendant John DeLiso, the defendant John McNamara, the defendant Thomas McNamara, the defendant Alphonse M. Merolla, and the defendant Alphonse Merolla, and other co-Conspirators, would obtain the property of the HarMac Contracting Corporation, and of

Harold Goberman, to wit, one, the sum of $1300, which was the property of HarMac Contracting Corporation; two, a trailor-type vehicle, which was the property of Harold Goberman, and was utilized in the construction of the building mentioned in Paragraph One; three, a contract release which was executed by Harold Goberman on June 28, 1972, which released the defendant Thomas McNamara and McNamara Re New Cars, Incorporated from contractual obligations in excess of $25,000 for a consideration of $25,000, and; four, other goods and services as requested by the defendant Thomas McNamara, which were not contractually required; all of which property was to be obtained with the consent of Harold Goberman and of HarMac Contracting Corporation, such consent to be induced by the wrongful use of physical violence and the threat of physical injury and damage to the person and property of Harold Goberman, and of the HarMac Contracting Corporation, by the said defendants and co-Conspirators, unless and until the said HarMac Contracting Corporation and Harold Goberman gave such properties to the defendant Thomas McNamara and McNamara Re New Cars, Incorporated."

Notes [illegible]

(continued on next page.)

MR. RITCHIE: (Continuing) Now, that I have read what the Government must prove I will now tell you what the Government intends to prove through the testimony of its witnesses.

Through the testimony of suppliers and various company representatives the Government will establish that in fact between March 1 and June 2 of the year 1972, Harold Goberman and Harmac were engaged in commerce.

Through the testimony of Mr.Goberman and through the testimony of a representative of the General Motors Corporation, the Government will establish that in fact the building was to be used for the sales and servicing of new automobiles which were to be shipped in interstate commerce from automobile assembly plants to the showroom once it was completed.

With respect to the element of extortion, Harold Goberman will testify that he did enter into a contract with Thomas McNamara, for the construction of the car showroom and was engaged in the construction of the building from March 1 or thereabouts -- in fact he had done some work before that -- up until June 28 of 1972.

That during the course of that construction he had occasion to consult with Mr. Thomas McNamara on various occasions. That during the course of their relationship, Mr. McNamara had a number of complaints about the way the building was being constructed and their relationship began to be unfriendly.

Gary Taibbi who will testify that he was the supervisor of construction on that job site will testify that shortly after he began work, which was on or around May 22, 1972, two individuals came down to the job site, one of the individuals asked him if the building was going up according to plans and he said yes.

The individual told him that he was a 25-percent owner of McNamara Buick-Pontiac and he wanted the building to go up according to plans or else. This individual told Taibbi that he could consider that a threat, he could go to the cops, he could go to the FBI because he was Al Merolla.

Now, Mr. Taibbi will not identify Alphonse M. Merolla. He will testify that a few days later those same two individuals, the one who identified himself as Al Merolla and the individual came back

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to the job site and said to him, that they wanted to see his boss, namely Harry Goberman.

Mr. Taibbi will testify that he then called up Harry Goberman and told him that these individuals were at the job site and wanted to see him and that he had better come down.

Harry Goberman will testify that he then came down to the job site and that he did meet with the two individuals and that the two individuals were Alphone M. Merolla -- Al Merolla and the other individual was John DeLiso.

He will testify that Al Merolla told him at that time that he had problems on the job, that he had better get in touch with his rabbi because he was connected with the Colombos --"he" meaning Al Merolla was connected with the Colombos -- and that they had better straighten this problem out.

Mr. Goberman will testify that he then did contact his rabbi -- his rabbi being someone Salvatore Spatarella and in a series of meetings that day between DeLiso and Merolla and Goberman and Spatarella the question of how the building was going up was discussed.

At the second of the two meetings, the man

captioned in the indictment as Alphonse Merolla, but known to Harry Goberman as Fat Nicky was present at that second meeting. At the second meeting after Harry Goberman said,"So what," to Al Merolla and Al Merolla said that he would guarantee the job because he was connected with the Colombos, Harry Goberman would testify that at that point Al Merolla shoved a table knife from the dinner in his side and said that he should kill him right there and now.

Mr. Spatarella then got up, washed his hands of the affair and left. Goberman will testify then there was another meeting set up in the McNamara Buick-Pontiac old building, which was in the main town of Port Jefferson, at that meeting was John Deliso, Al Merolla and Fat Nicky as well as Angelo Merolla, Rocco Merolla and John McNamara.

HE will testify that he took his brother Al along to that meeting. Both Al and Harry Goberman will testify that at that meeting there was a discussion about the course of the construction, that Al Goberman was then told to leave the room and Harry will testify while he was in the room he was beaten, a gun shoved down his throat by Al Merolla and he was told that he had better do what he was told to do.

Al will testify that he heard scuffling from the inside, heard Thomas McNamara state that he would kill Harry Goberman andthat when he reentered the building he saw Al Merolla -- when he reentered the room,I should say, he saw Al Merolla hand a gun to John DeLiso -- hand it back to John DeLiso.

Now, Harry will testify that he observed John DeLiso hand that gun to Al Merolla prior to its getting shoved down Harry's throat. Both individuals will testify that Harry Goberman was then required to sign over a check for $1300 and to sign over a bill of sale and a registration form for his construction trailer.

Now, Harry will testify that he didn't have any checks on that date, so McNamara supplied a counter-check. You will get to see the check that he signed on that date and you will get to see other checks that were issued on his account regularly and it will be fore you the jury to compare.

Now, in addition, Harry Goberman then went to the bank and Allen was left behind and that check was cashed. That will be Harry Goberman's testimony. Now, in the period subsequent to June 5th, Harry Goberman will testify that on a number of occasions

during arguments he was threatened by one or another of the defendants, that on occasion subsequent to June the 5th, Fat Nicky, Al Merolla and John DeLiso were present down at the job site and that on one occasion during a heated discussion with Thomas McNamara, he was told that Thomas McNamara had a contract on him, if he didn't do what he was told.

Gary Taibbi will testify that during the course of the heated discussion he heard Thomas McNamara say to Harry Goberman, that he had a contract on his head. A sub-contractor who went to collect money from Thomas McNamara after Harry Goberman was off the job will testify that when we told McNamara that he was going to put a lien on the building, McNamara told him to tell Goberman that he had a contract on his head, not on his body, but on his head.

He had $10,000 in a safety deposit box that anything happened to him, his wife or family, his building, that the $10,000 would go into effect. He will testify that he was told by McNamara to tell Goberman that they would put his head on the bumper of the car and let it go by the building one last time.

Harry Goberman will testify on June 28th he

again went to the McNamara Buick-Pontiac old building and was there asked to sign a contact release.

He refused initially but then he did sign it. This is on June 28th. It's a fairly important date that I am pointing out to you because it's the date mentioned in the indictment on a number of occasions.

Alex Gindowsky, a salesman, employed by McNamara, who was a Notary Public as well as being a sales man, will testify that he was present at that meeting and that he observed Harry Goberman sign that contract release. That he recalls Angelo Merolla and Al -- Alphonse M. Merolla being present during that meeting. Harry will testify that Thomas McNamara was not present at that meeting, but a Sandra DiNunzio, a secretary for Thomas McNamara's civil attorney Timothy Shea,will testify will testify on June 28 she notarized the signature on the contract release of Thomas McNamara.

George Coke, who is an officer of the Marine Midland Tinker National Bank will testify that that bank was the lender of the construction monies to McNamara ReNew Cars, Inc.. He will testify that he received a letter -- he kept it in his files --

from Thomas McNamara dated June 29, 1972 and that letter stated that Harry Goberman had mutually agreed to quit the project on June 28th.

Attached to that letter was a copy of the contract release and a copy of the receipt. Yet the evidence will establish that that contract release was hidden or destroyed after the U.S. began an investigation of an allegation.

The evidence will establish through the testimony of Timothy Shea that there had been a meeting in the offices of the U. S. Attorney between himself, Timothy Shea, himself, a Mr. Raymond Bergen and Mr. Richard McMullen who is present here and on that occasion he was asked -- he stated that he would turn over to the Government any documents that it requested.

The evidence will establish that releases were requested -- that contract release was not turned over.

The evidence will establish through the tesitmony of Timothy Shea and through the testimony of John Ciney, an accountant for the McNamaras ReNew Cars, Inc., was subpoenaed to produce any contrac releases and the evidence will establish that that

contract release was not produced.

The evidence will establish through the testimony of Timothy Shea and through the testimony of Special Agent McMullen that a search warrant was executed on the files in the office in that showroom and that no contract release was found.

Now, Timothy Shea, the attorney for McNamara ReNew Cars, Inc., will testify that the reason --

MR. MEISELMAN: Objection, if your Honor please.

THE COURT: On what ground, sir?

Would you read that, please.

MR. MEISELMAN: I'd rather have a side bar.

THE COURT: All right.

(continued next page.)

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(The following transpired at the side bar.)

MR. MEISELMAN: I have fully intended raising this at the trial, the question of the confidentiality of a communication between Mr. Shea and his client or clients and what he did or did not do on their behalf and the reasons.

I believe it would open to the jury -- raise a question in their minds that would not be put to rest during the trial.

MR. RITCHIE: I believe at the last trial Mr. McNamara effectively waived any attorney-client privilege and that he allowed the testimony to go in, if there is any testimonial privilege here.

THE COURT: The testimony as I understood it was a claim by the Government of improper conduct in response to the search for a document under a search warrant; is that right?

MR. RITCHIE: Your Honor, the Government's position is that this evidence is evidence of spoliation and as such it would be properly admissible against the defendant Thomas McNamara. It was admitted during the last trial. I submitted a fairly detailed factual memorandum before the testimony went in and I also submitted some law on the subject.

With respect to the question of attorney-client

privilege, I believe it is waived at this point and at any rate, the client we are talking about -- I stated it in my opening -- is the corporate identity, McNamara Re Nu-Cars, Inc. and that was the basis on which the testimony went in the last time, and at that time Mr. Shea was present who could have asserted the privilege.

Mr. Hoey was present who could have also asserted the privilege on behalf of Thomas McNamara and neither one raised the privilege and I am not going any further in my opening than to which the Government went during its questioning of Mr. Shea.

MR. MEISELMAN: It is fairly clear since the United Shoe Company case, that there is a confidentiality between attorney and client, whether it be a corporation or otherwise.

THE COURT: Of course there is.

MR. MEISELMAN: I do not think there was an effective waiver. The record is somewhat confusing with respect to the colloquy.

THE COURT: What is the confidentiality?

MR. MEISELMAN: Why would a lawyer do something on behalf of a client? He may have very good reasons between himself and his client and it is not the business of anyone else.

THE COURT: What utterance are you saying that Mr. Ritchie has referred to which is a privileged utterance?

MR. MEISELMAN: Mr.Ritchie was about to say that Mr. Shea -- will say that his reasons for doing -

MR. RITCHIE: There was no consideration --

MR. MEISELMAN: Whatever the reasons may be, they are confidential between attorney and client.

THE COURT: Who did he say it to?

MR. RITCHIE: He said it before this Court on the date that he testified.

MR. MEISELMAN: And there was an objection to it.

MR. RITCHIE: I do not believe there was.

THE COURT: Testimony that he gave in this Court could hardly be privileged.

MR. MEISELMAN: The objection was raised, if your Honor please.

THE COURT: As I recall the evidence --

MR. RITCHIE: I am sorry?

THE COURT: The paper was, as I understand it, a contract release?

MR. RITCHIE: Right.

THE COURT: And it was known to have been typed in the Timothy Shea office, known to have been signed --

MR. RITCHIE: Signed and notarized and taken back by Thomas.

THE COURT: And then delivered to the client?

MR. MEISELMAN: I have no objection to that.

THE COURT: It was then the subject of a search warrant or a request for production?

MR. RITCHIE: And also a subpoena.

THE COURT: And it was subpoenaed and never produced from the files of the lawyer or from the files of the client.

The question was what happened to it. Mr. Shea -- Timothy Shea was interrogated about that.

Now, there isn't any confidential communication between attorney and client in any of this.

MR. MEISELMAN: I believe --

THE COURT: He was asked to testify about what Mr. McNamara or some officer of either of the McNamara corporations said to him in explanation. That could or could not -- depending on the circumstances -- be a privileged communication, but not what Mr. Shea offered as his explanation of his own conduct.

MR. MEISELMAN: It wasn't an explanation with respect to the document. He is now stating to the jury that Mr. Shea will testify as to why he didn't

raise this as a defense in a contract action.

MR. RITCHIE: We had testimony on that already. If there were any attorney-client privilege, it was waived in the last trial.

THE COURT: I do not see the confidential communication.

MR. MEISELMAN: It is what an attorney does as well as what he says on behalf of a client which is confidential.

THE COURT: No, he may use the evidence in Court.

MR. FISCHETTI: Your Honor, not on this point but not to get up again, may we have for the record an objection to the "Colombo" reference? I know your Honor's ruling.

THE COURT: Yes, we had gone into it the last time.

You'd rather that he not interrupt you, right?

MR. RITCHIE: I'd rather get it settled now.

MR. FISCHETTI: The record is protected, we objected to it.

THE COURT: Yes.

(The following transpired in open Court.)

(Continued on next page.)

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(The following occurred in open Court.)

THE COURT: Members of the Jury, while Mr. Ritchie is trying to get his throat back in working order, as you see he has a slight bronchial infection, let me explain to you.

Side-bars aren't because we have any secrets from you -- we try not to -- but because we have an occasion to discuss something which includes references to matter which is not yet in evidence and may never come into evidence.

In order to avoid confusion, since, as you remember your oath, you have to decide the case on the evidence, it is far better that you do not hear anything which may never come into evidence, so that you won't have the sometimes but impossible task of trying to sort out in your own mind what is in evidence and what is not in evidence.

It is easy to sort it out if you haven't heard it. Hence the side-bar. It isn't the most famous of side-bars, what goes on in the uddle or in those talks on the mound, though I have been told all they ever do is discuss where they are going to eat dinner.

This is not that high strategy at all.

Continue, please.

MR. RITCHIE: There was a request, a subpoena,

a search warrant, no production.

Mr. Shea will testify that the reason there was no production was because the document was destroyed. He will testify that the reason the document was destroyed was because it was a worthless instrument. He'll testify that it was a worthless instrument because it wasn't supported by valid consideration.

Valid consideration is a legal term meaning when you are giving something you got to get something, and consideration is the something that you get in return for what you give.

He will testify that there was no consideration, no money paid or whatever. Harry Goberman will testify that on that date he signed a receipt stating that he had received $25,000.

George Culp will testify that in that letter there was an attachment of that receipt, and you will see that receipt in this Courtroom, reciting a consideration of $25,000 paid from Harry Goberman to McNamara New Cars, Inc.

Harry Goberman will explain not why the release was destroyed but why -- well, he'll explain, he'll testify that on June 28th he had refused to sign that contract release and he didn't sign it until after

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he was beaten, after he was beaten by John McNamara, John DeLiso, Alphonse M. Merolla, Al Merolla, Fat Nicky, Angelo and Rocco Merolla.

Thomas McNamara was not present in that room at that time.

He'll testify that he then signed the contract release and he signed the receipt for the $25,000 but he never received the $25,000. Instead he received another beating, he was told that he better not go to the cops like he had the last time, and he was told that they had a cab waiting for him outside.

He received a cab ride. He will testify that he got in the cab, went 14 miles to where his car was parked, he'd been driven there by the Merollas, got in his car and he was arrested for driving with, I believe, a phony dirver's license, an alias, Harry Masterson.

The detective from the Suffolk County Police Department who arrested him will testify that he observed his condition, that the man was limping and that the man didn't have $25,000 on him, that he had $200 on him.

An attorney who went down to the police station will testify that Harry Goberman was limping, that

his suit was ripped and a doctor who examined Harry Goberman that day will testify about Harry Goberman's physical condition on that day, and the extent of the injuries that were suffered by him.

Richard McMullen will testify that after this first meeting between Timothy Shea and Raymond Bergen and himself, there was a second meeting at which those two individuals were present, he was present, and Thomas McNamara was present, and that at that meeting Thomas McNamara related eleven incidents in which he was allegedly threatened or --

MR. FISCHETTI: Objection, your Honor.

When is this meeting now?

THE COURT: I'm sorry, I didn't -- I missed the first part of the reference. This was an occasion when?

MR. RITCHIE: Do you want to have it read back?

(Record read.)

MR. FISCHETTI: I object to that, your Honor, unless that meeting is established by date.

MR. RITCHIE: Your Honor, that will be established in the course of testimony, that date.

THE COURT: It is unfamiliar to me.

MR. RITCHIE: Would your Honor like a side-bar?

THE COURT: No.

MR. FISCHETTI: I object to it if it is not during the scope of this indictment. I don't know when this meeting occurred.

MR. RITCHIE: Can we have a side-bar?

THE COURT: No. Testimony does not have to relate to periods -- to occurrences within the period charged if the content of them is evidentiary of the period of the indictment. That could be the case here because these are statements with respect to matters occurring at an earlier date, of course.

MR. FISCHETTI: I understand, sir. My objection is based on the fact that if this statement was made to Mr. McMullen subsequent to the indictment we might have a Bruton issue.

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(Continued on next page.)

THE COURT: Did you say subsequent to the indictment?

MR. FISCHETTI: That is what my inquiry is.

MR. RITCHIE: I didn't say that. It was not subsequent to the indictment, it was --

MR. FISCHETTI: Subsequent to the acts that are charged in the indictment, sir.

THE COURT: Except the --

MR. FISCHETTI: I just don't know if this is a Bruton statement, sir.

THE COURT: Paragraph 3, the end of the first line.

MR. FISCHETTI: I see it, sir.

THE COURT: Proceed.

MR. RITCHIE: Thank you, your Honor. Mr. McMullen will testify that at that meeting between Thomas McNamara, Raymond Bergen, Timothy Shea, the attorney for McNamara, himself, Thomas McNamara related eleven separate incidents in which he was either beaten or threatened or spat upon or kicked by Harold Goberman prior to June of 1972.

Mr. McMullen will relate that in response to questions, Mr. McNamara said that nobldy ever observed any of these kickings, beatings, spittings or threats, and that he had not told the police

about it, and that he had not told his own son, who was a United States Attorney, about it, but that he did tell his attorney Desmond O'Sullivan, another attorney he obtained, about it, and that when he and Desmond O'Sullivan went to the Suffolk County District Attorney's Office to complain about an alleged criminal fraud by Harold Goberman, that the Assistant District Attorney John Ehrlich was told about these threats, these punches, these kicks, these spittings, these beatings.

Desmond O'Sullivan will testify that he was not told about any of these incidents and John Ehrlich will testify that he was not told about any such incidents.

Now, in addition to the individuals that I named, there will be other government witnesses. I would at this time just thank you for your listening and I will have one more opportunity to talk with you, and that will be at the close of the case. I thank you.

MR. FISCHETTI: May I, sir?

THE COURT: Mr. Fischetti.

MR. FISCHETTI: Thank you, sir.

Judge Dooling, Mr. Ritchie, Ms. Katz, my

colleagues at the defense table, Ms. Kurtz, my name is Ronald Fischetti, I represent John DeLiso who sits next to me in the brown jacket.

We are here today because this is a criminal case. John DeLiso is here today because he's charged with the crime by virtue of a piece of paper, this indictment that Mr. Ritchie has told you, as Judge Dooling has told you, as I'm about to tell you, this indictment is nothing more than a piece of paper. It is an instrument, it is what brings John DeLiso here into this courtroom, much the same as a summons in a civil case brings a defendant into the courtroom. In answer to this indictment, in answer to these charges, on another day at another time, Mr. DeLiso stood here and said, "I am not guilty."

That put in issue each and every allegation, that Mr. Ritchie and the government charges Mr. DeLiso with. And you are here to decide this matter. You see, the government, under our system of laws here in America, operates on the theory that Mr. DeLiso, as well as every other defendant seated at this counsel table, is innocent until proven by the government guilty beyond a reasonable doubt. And that the government has the burden.

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MR. FISCHETTI (Cont'd): Those are very important words and they are not mere words, they are how our system operates. Reasonable doubt, burden of proof.

It is not my job to explain those words to you, Judge Dooling will do that at the end of the case.

He will charge you, that is his role. Each of us has a role in this Courtroom, Mr. Ritchie, Miss Katz, on behalf of the Government, I represent Mr. DeLiso, other counsel represent their respective defendants, and you, too, have a role. Yours is perhaps the most important role, because you are the sole and exclusive judges of the facts. You must determine whether a witness is credible or not credible, and ultimately you will decide the guilt or innocence of John DeLiso.

Now, we said burden of proof, very important. Burden of proof simply means that Mr. Ritchie and the Government must prove everything. We need do nothing. We need not offer any evidence, we need not call any witnesses, we need not cross-examine. In fact, I need not even stand here and open to you and say these words. We can just sit there and say,

Mr. Ritchie, the Government brought these charges, you prove them beyond a reasonable doubt. But we will come forward, we will offer evidence.

Mr. DeLiso need not testify in his own behalf. I will make that decision as his attorney. If Mr. DeLiso, through me, chooses not to testify, you may not draw any unfavorable inference from that. Judge Dooling will tell you that in his charge, because Mr. DeLiso, as well as each and every defendant seated at counsel table, is surrounded with a presumption of innocence; it is a shield that protects him, and it is with him throughout this entire trial, right now, during the course of the trial indeed, during your deliberations in the Jury room he is presumed innocent and that presumption, and that presumption alone is enough to acquit him.

What about these charges? You've heard Mr. Ritchie talk for quite some time about what the Government is going to prove, and he said in his opening -- I do agree with some things the Government attorney says -- he said in his opening that everything that he says is not evidence. If it were evidence, there would be no reason for me to stand here, but

it is not. He must prove these things. And he's going to attempt to prove them through the Government's main witness, Harry Goberman.

In the course of his opening statement, which took some forty minutes, he mentioned Harry Goberman numerous times and said to you very quickly, I thought, that he's a man who was a convicted felon on two occasions --

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(Continued on next page.)

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MR. RITCHIE: Your Honor, I am going to object to Mr. Fischetti's injecting his own personal comments about how quickly or not quickly I have told the jury about certain things.

THE COURT: I don't think your interruption is in order, but please, you stay by the rules and just tell the jury what it is you have in mind for the presentation of your defense, that's all they want to know at this point.

MR. FISCHETTI: Very well, sir.

We will prove that Harry Goberman used numerous phony names for the purpose of defrauding creditors out of services; for the purpose of defrauding people out of money; for the purpose of defrauding stores out of goods.

We will prove that Harry Goberman is a convicted felon in that he took a loaded weapon and pointed it at a truck driver's head and hijacked a truck.

We will prove to you that Harry Goberman planned a murder for money. We will prove to you that Harry Goberman, as he sits on that witness stand, will testify that he is suing each and every one of these defendants in this Courtroom for $2,000,000 civilly.

We will prove to you that he has done all these

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things for money and we will prove to you that the reason why he is testifying here in this Courtroom is for money.

We will prove to you that from the moment this case started, Harry Goberman fooled the Government. We will prove to you that Harry Goberman fooled a judge -- not this Judge, but another judge -- conned him into sending him to a mental institution to avoid a trial. We will prove that.

Hold me to it and hold everyone at defense table to it.

What do I ask of you? I ask for your patience, I ask that you abide by your oath as jurors. You see, we have four trials going on here, not one.

I represent only John DeLiso, that is my responsibility, his representation. The decision as to what you are going to do with Mr. DeLiso, his guilt or innocence, must be decided by you separately.

So I ask that during the course of this trial when you hear numerous references and numerous documents come in, keep a little compartment, if you can, in your mind and remember every time a witness mentions the name of John DeLiso.

As an example, Mr. Taibbi, the Government has

stated that Mr. Taibbi will testify that two gentlemen came to the job site and these same two gentlemen met Harold Goberman later and that these two gentlemen, according to Mr. Goberman, was one of the Merolla's and John DeLiso.

I say to you that Mr. Taibbi will not identify John DeLiso. I say to you that Mr. Taibbi will identify two people who are not even on trial in this case and who are not charged with any crime, the same two people that Mr. Goberman will identify.

That is what I mean by watching the ball and keeping your eye -- every time somebody mentions the name John DeLiso, keeping your eye on that.

I have other counsel to follow and I won't be any longer. I thank you for your patience and ask you to watch each witness, judge their credibility and make the decision on that basis.

Thank you.

MR. GILLEN: Judge Dooling --

THE COURT: Mr. Gillen.

MR. GILLEN: Yes, sir.

Judge Dooling, Mr. Ritchie, Ms. Katz, brothers at the bar, co-counsel, madam forelady, ladies and gentlemen:

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My name is Michael Gillen. I am co-counsel with Leonard Meiselman in the defense of Thomas McNamara. I join in the remarks made by Mr. Fischetti.

A question to ask yourselves during this trial, based upon the proof, is does the Government seriously contend or believe that Harry Goberman did not threaten Thomas McNamara, as you will hear the threats related?

Harry Goberman, we will prove, is a man of violent propensities, a man taken up with guns, fire-arms, pistols; a man capable of putting a gun to a truck driver's head and saying, "Do as I tell you, you son of a bitch, or I'll kill you!" With a loaded gun, we will prove that.

Harry Goberman, we will prove, violently engaged in a shoot-out up inthe Bronx at the old west movies; Harry Goberman, we will prove to you, ladies and gentlemen, is a violent man. We will prove an incident that happened in Pennsylvania when he took a bulldozer and bulldozed a trailer where people were in it.

We will prove that Harry Goberman is a confidence man and has been all his life and he will try to con you right from this stand.

We will show him committing crimes on this stand, actual crimes in violation of the laws of the State of New York, right in this Courtroom before your eyes.

We will show a man who has used over 32 aliases that we know of; we will show the man and we will prove that this man today, or when he comes into this Courtroom, will be using an alias of Masterson -- hold us to that, please, hold us to that.

We will prove that this man has lived a life of bottomless corruption --

MR. RITCHIE: Your Honor, I am going to object to the characterization by Mr. Gillen.

MR. GILLEN: I am going to prove it, your Honor.

THE COURT: I don't think, Mr. Ritchie, that you are free to interrupt.

But you, Mr. Gillen, must not characterize. Please tell the jury what it is you mean to show.

MR. GILLEN: Fine.

We will show that Harry Goberman, through the use of all these names, as Mr. Fischetti has said, steals clothes, steals money, steals just about anything he can through the use of false names.

We will show Harry Goberman doesn't care about other people. We will show he will rule people for money. We will show Harry -- as Mr. Fischetti said, I think he said 2,000,000, but I think the figure is closer to two and a half million that this man is suing these defendants for.

We will show, as this trial goes on, as Mr. Fischetti has said, that this guy has pulled the wool over the Government's eyes. We will show by Mr. Harry Goberman, from the time he gets on that stand, from the time he gets off that stand, he will be lying through his teeth to you people.

Watch him when he testifies and see if he answers questions. There is a name Spatorella which has been mentioned here by Mr. Ritchie in his opening. You will see a murder case, a human life was taken, and Mr. Goberman, by his own admission, took part in planning the taking of a human life for money. Mr. Spatorella's name was mentioned in connection with this killing. This is the Government's witness.

We will show Allen Goberman, his brother, who the Government is using to corroborate this man, that on two occasions he was questioned by a detective of the Nassau or the Suffolk County Police Department,

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a detective Thomas Gill, and he was asked by Detective Gill -- and this is proof that will come right from this witness stand, and hold us to it, please, right here -- Detective Gill will testify twice he questioned Allen Goberman and asked Allen Goberman if there was any gun on this June 5th incident. Allen Goberman said no.

We will call a girl called Dorothea Tomasselli. Dorothea Tomasselli was employed at McNamara Buick. She will testify that on June 28th she was called in to witness Harry Goberman sign a contract release by John McNamara, and that she did go in and did witness this man signing that contract release.

Harry Goberman is going to tell you he was beaten, horribly beaten; one time he will tell you he was beaten with blackjacks, another time he will tell you he was beaten with fists, it always gets better and different each time, and hold us to that; she will testify she was called into a room, Mr. Alex Giandowski, a Notary Public, also an employee of the McNamara's, notarized this document and Dotty Tomasselli saw him sign it.

She will testify that Harry Goberman, when she came in, appeared to her to be reading the contract

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release and discussing it with John McNamara, the son of Thomas McNamara, and that Harry Goberman inquired or asked some questions of John McNamara concerning the release. She doesn't recall what the questions were, but they discussed it, then she saw him sign it.

She will tell you Harry Goberman looked fine, nothing wrong with him. She will tell you Harry Goberman was in complete control of himself and his situation. She will tell you nothing unusual occurred. She will also tell you that on June 5 she has a recollection because of certain documents, a receipt for a trailer and a registration, that she saw Harry Goberman on June 5.

She will tell you on June 5 nothing unusual happened. She doesn't even have that great a recollection, she will tell you, because it was a normal day, there was nothing wrong with Harry Goberman. She doesn't even know Alley Goberman so she doesn't know whether Allen Goberman was there or not, as Allen Goberman says he was. She doesn't know because she doesn't know him.

Alex Giandowski, the Notary Public, he will say on June 28th he notarized Harry Goberman's signature on that release and that Harry Gobermen was

fine, fine. This is the man that is going to tell you he was beaten horribly with weapons, blackjacks, beat, beat, beat! This is what he is going to tell you.

Then you are going to find out he is told, according to Mr. Ritchie, "Don't tell the cops."

(Continued on next page.)

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Two detectives pick him up right outside. Because they're going to have to prove that McNamara is in fear of Harry Goberman, asked the police to come down.

Mr. Ritchie has said he will introduce evidence where McNamara, Thomas McNamara says to Harry Goberman, "I have a contract out on you. If anything happens to me, my family or my building, you will be taken care of."

We will show you, ladies and gentlemen, through those very words, that those are the words of a man in deadly fear of his life.

Think of it. "If anything happens to me, my wife, my child, my building, my property, I'll get you."

Whom do you say that to?

We will show at this time Thomas McNamara knew of the violent propensity of Harry Goberman, knew of his involvement in planning a murder, knew of his guns and known to carry guns and proud of the fact he carries guns, this man Goberman. He knew this. Keep that in mind.

Is the Government seriously contending that Harry Goberman never threatened Thomas McNamara?

We are not going to sit idly by. This indictment was gotten through a Grand Jury. Here, in this court, in the light of an American courtroom, through cross-examination, we will get the truth. It's not that easy to get. Keeping in mind you are dealing with an expert con-man, who will stop at nothing to get what he wants.

Weigh him on that stand, see if he is telling the truth, and this man Taibbi, when he comes in here, see if he is telling the truth, this man Taibbi, or see if he isn't a cohort of Harry Goberman and expects a job of some sort.

I just asked you for a fair shake. Thank you.

THE COURT: Ms. Seltzer.

MS. SELTZER: Judge Dooling, Mr. Ritchie, co-counsel, Madam Forelady, I don't know how one follows Mr. Gillen in an opening statement such as that.

I don't think there is too much that I can say that Mr. Gillen and Mr. Fischetti have not said.

I would just tell you at this time that my name is Marian Seltzer and I am the attorney for Alfonse M. Marolla, who is seated at my left at the counsel table.

I would also like to introduce to you Mr. John

Keeney, who is sitting on the right side of the first row, who will be in and out of the courtroom during the course of this trial. Mr. Keeney is an investigator for the Federal Defender Services Unit of the Legal Aid Society and will be assisting me during this trial.

MR. RITCHIE: Your Honor -- Go on.

MS. SELTZER: I would just make one point at this time, as far as what has been said about this Mr. Goberman. There is a word in the English language and that word is "amoral," and it's reserved for a certain type of person. I don't think there are too many people in the world who can be classified as amoral, because it's something a lot worse than someone who is immoral. Somebody who doesn't know --

MR. RITCHIE: Your Honor, I must object.

THE COURT: Well, I think this is hardly an outline of the case which you expect to make for the defendant Alphonse M. Merolla.

Opening argument should be directed to that, not to the summation --

MS. SELTZER: Yes, your Honor.

THE COURT: -- of evidence.

MS. SELTZER: I think that as Mr. Ritchie has

indicated, Mr. Goberman will testify that Mr. Merolla supposedly committed certain acts of violence against him at Mc Namara Buick, and my point, your Honor, is that Mr. Goberman in his testimony is probably incapable of telling the truth.

THE COURT: Well, in other words, you rely on what you claim to be the incredibility of his testimony.

MS. SELTZER: That's correct, your Honor.

THE COURT: Very well.

MS. SELTZER: But this testimony that will be brought out by the Government and very strongly refuted by the defense will be given by a man who you will see, when given the opportunity to tell the truth or tell a lie, will tell a lie. When given the opportunity to do something in an honest way or dishonest way, will pick the dishonest way, whether it's because he gets some kind of a thrill or a kick or whether it's just pure greed, for money, on his part.

But I think that's how you will have to evaluate the testimony that Mr. Goberman gives as to both Mr. Merolla and the other defendants in this case, because we are not dealing with a normal human being here.

MR. RITCHIE: Your Honor, I feel I must object

again.

THE COURT: Unless you plan to produce evidence to that effect.

MS. SELTZER: Yes, your Honor, I think there will be evidence as to his psychiatric --

THE COURT: Outline the evidence that you mean to have presented.

MS. SELTZER: Now, Mr. Fischetti has mentioned to you certain basic elements in the American system. One of those is the presumption of innocence, and I too at this time have reserved decision as to whether my client, Alphonse M. Merolla, will testify, and it is up to me to decide after the Government's case whether or not Mr. Merolla will testify.

If he does not, the Judge will tell you at the close of the case that you cannot make any inference from the fact that the defendant does or does not testify. He has a right to remain silent during the course of the trial and he has a right to rely on the presumption of innocence. That is a basic part of our system.

So I'm asking each of you to do only one thing during the course of this trial, and that is to keep an open mind and to listen to the evidence and to give

each of the defendants seated at that counsel table the same fair trial that each of you would accept if you were the unfortunate victim of a federal indictment or if some member of your family was a defendant in a criminal action, and I think that if you do that, you will find the truth and we will have a fair trial.

Thank you very much.

THE COURT: Mr. Leone?

MR. LEONE: Your Honor, at this time the defendant Alphonse Merolla will waive opening statement.

THE COURT: Very well. Mr. Ritchie?

MR. RITCHIE: Before we begin, may I have a sidebar?

THE COURT: Excuse me?

MR. RITCHIE: Before we begin, may I have a sidebar?

THE COURT: Yes.

(Sidebar follows.)

MR. RITCHIE: Your Honor, I just want to put an objection on the record to the use of the word "con-man," and a couple of other characterizations by Mr. Gillen, because your Honor told me not to interrupt at that point. I didn't interrupt but I'd like to

state the objection now.

I don't think it was proper argument at all.

MR. GILLEN: I said I'll prove he's a con man.

THE COURT: That is as I understood.

MR. GILLEN: Yes.

THE COURT: They were being conned.

MR. GILLEN: And the Government is being conned. I think I said that, too.

MR. FISCHETTI: Appropriate time, sir, for a recess?

THE COURT: Very well.

(In open court.)

THE COURT: We will have a short recess now. It is not appropriate to call it a cigarette break.

Please do not discuss the case with one another or anyone not on the jury until it is finally given to you to decide.

All right.

(The following occurred in the absence of the jury.)

MS. SELTZER: Excuse me, your Honor.

MR. RITCHIE: Your Honor, we have a problem Mr. Fischetti has made me aware of.

I had not intended to turn over any 3500 material that had previously been turned over.

I now understand that Mr. Fischetti does not have this 3500 material.

MS. SELTZER: I have never received any.

MR. RITCHIE: You've received --

THE COURT: They are new in the case.

MR. RITCHIE: You will receive whatever you were to have received today. There will be no problem.

MR. MEISELMAN: I have received nothing.

MR. RITCHIE: Because I've given you Cifarelli. I have given you my first couple of witnesses' testimony and you've Xeroxed it. That's the only 3500 material on that. They were just interstate commerce witnesses. Tomorrow you will receive, I guess, the 3500 material on those witnesses.

MR. MEISELMAN: Mr. Ritchie, are you addressing Ms. Seltzer, me or both?

MR. RITCHIE: Iwas addressing Ms. Seltzer. With respect to you, everybody else has been tried before.

MR. LEONE: That's twice and I have tried to interject that we have a new defendant in this case.

THE COURT: I know we are talking about copies of papers, gentlemen. Either you have or haven't got them.

MR. FISCHETTI: I don't have them.

9 THE COURT: Why not?

MR. FISCHETTI: Because when I had the first trial, sir, I believe I gave some of the stuff back to Mr. Pollack. I may have given some to Mr. Merolla and I never thought for a moment that I would have to categorize 3500 material again when all it means is photostatting by the Government.

MR. RITCHIE: When all it means is the Government does it.

I'll do it, your Honor, if your Honor directs me to.

THE COURT: Would you please do it. This is really quite inexcusable. The trial ended in a mistrial, at the end of the trial, and every one of you who was here knew it was going to have to be retried and might at least have had the foresight to put the Xeroxed 3500 material to one side, so that you could adequately prepare for this trial.

MR. RITCHIE: Your Honor, may I delete from any 3500 material any testimony at the last trial?

THE COURT: No.

MR. RITCHIE: Yes, your Honor.

MS. SELTZER: Excuse me, your Honor. I understand that at the last trial there was a ruling by your Honor as to Mr. McMullan bringing in the witnesses from outside.

10 Apparently I read in the record that he had given the appearance that they were in protective custody or something like that.

MR. RITCHIE: I remember your Honor's ruling and I've talked to Mr. McMullan already.

THE COURT: What was it? I have no idea.

MS. SELTZER: Thank you.

MR. MEISELMAN: Your Honor directed at the last trial that the witnesses are capable of coming in without Mr. McMullan being an escort.

MR. RITCHIE: I have agreed.

THE COURT: I imagine they can walk.

MR. RITCHIE: We might at times have a shepherding in of a witness but it will not be done -- the problem was that it was Harry Goberman the last time and the other witnesses didnt have this elaborate shepherding in.

The only thing we'll have, if we have to get a witness from the witness room, probably my agent or if he walks, myself, will go in and get the witness, but it won't be done in any fashion to suggest any type of impropriety. Just a necessary way of getting a witness in.

(Recess taken.)

(The following occurred in the presence of the Jury.)

MR. RITCHIE: Your Honor, the Government would call as its first witness Mr. Richard Anderson.

THE CLERK: Yes, sir. If you'll stop right here, sir, face me and raise your right hand.

R I C H A R D A N D E R S O N , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. RITCHIE:

Q When you answer questions, Mr. Anderson, I'd request that you speak loud enough so that this last juror in the rear can hear you and so that Mr. Gillen, the last man in the end of the defense counsel table, can hear you.

THE COURT: I think it will be helpful, Mr. Anderson, if you talked into the microphone.

THE WITNESS: Okay.

Q Mr. Anderson, what is your occupation?

A I am the office manager for Hunt Transportation in Omaha.

Q And for how long have you been so employed?

A Eight years.

Q What are the duties of the office manager at

Hunt Transportation?

A I manage all the accounting. I do the financial statements, take care of all the records, am responsible for the records to see that they are filed properly.

Q What records do you maintain control over?

A Any records that pertain to the accounting.

THE CLERK: Documents marked for identification as Government's Exhibit 2.

(So marked.)

Q Mr. Anderson, I show you what has been marked as Government's Exhibit 1, which is a 10-page document.

Do you recognize that document?

A Yes, I do.

Q What is it?

A It's a copy of our freight invoice that we billed the customer for, copies of delivery receipts, showing where we delivered and copy of the bill of lading from the shipper.

Q Now, with respect to the Government exhibit, do you know how those documents are prepared?

A Yes, I do.

Q With respect to the bill of lading, how is that prepared, and when does it come into your possession?

A The bill of lading is prepared by the shipper

when the material is ordered and it is sent to our office and we dispatch a truck for the load and as soon as the truck has started the load, we bill the invoice to the customer for the freight charges.

Q Is that with respect to any time that you are carrying any goods for a particular shipper?

A It's the same policy for every load that we haul.

Q And they're always prepared when you pick up goods for shippers?

A Yes.

THE COURT: Who signs and issues the bill of lading?

THE WITNESS: Who signs the bill of lading?

THE COURT: Yes.

THE WITNESS: From our company it is one of our drivers that picks the load up.

THE COURT: Yes, but the bill of lading is the bill of lading of your company?

THE WITNESS. No. It's the bill of lading of the shipper, Velmont Industries.

THE COURT: It's prepared by them but it is issued by your company to show your receipt of those goods for carriage, isn't it?

THE WITNESS: It's issued by Velmont to us.

BY MR. RITCHIE:

Q With respect to the first page of that document, what is that first page?

A That's our freight bill that we send to the customer, showing the charges that we are billing them for.

Q How is that document prepared? If you know.

A That document is prepared in our office from the bill of lading. Information from the bill of lading is typed on to the freight invoice and we in turn send a copy of this bill of our customer for payment of freight charges.

Q Does that first page indicate the number of stops that were made on that particular shipment?

A Yes, it does.

Q How many stops were made in total?

A Six.

Q What was the first stop?

A Merkel Electric, Port Jefferson, New York.

Q What --

THE COURT: Could you spell Merkel for the Court reporter?

THE WITNESS: M-e-r-k-e-t.

Q That's the spelling that you have; is that correct?

A From the bill of lading.

Q And with respect to the second through ninth pages of that document, what are those pages?

A They are delivery receipts showing where we stopped for parts of this shipment.

Q And who prepares those documents?

A They are typed in our office and given to the driver when he leaves.

Q And is anything added to those pages after they've left your office?

A Yes. The signature, when they're delivered by the person who signed for it, when he receives the material.

Q He signs at the bottom of the page?

A Right.

Q Now, with respect to the -- with respect to the first page of that document, do you have custody over the copy of that document after it is prepared?

A Yes, I do. I'm in charge of taking care of these documents.

Q That's in the regular course of your business, as office manager of Hunt Transportation; is that correct?

A That's one of my responsibilities, yes.

Q With respect to the second through ninth pages, is that also correct?

A Yes, to be attached to the freight bill. They have to be kept together.

Q With respect to the tenth page, is that also kept by you in the regular course of your business?

A Yes, it is.

Q And is that also required to be kept with the other nine pages of documents or however many pages there are on a particular shipment?

A Yes, it is.

Q Now, I show you Government's Exhibit marked No. 2 for Identification and I ask you what is that document? Do you recognize that document?

A Yes, I do.

Q What is it?

A It's a copy of our driver's log.

Q In connection with the shipment represented in Government's Exhibit No. 1?

A Yes.

Q And is that log regularly prepared by a driver when he's delivering goods?

A Would you repeat that please?

Q Is it the regular course of your company's business to prepare such a log when a driver delivers goods?

A Yes, it is.

Q You have custody over that document or a copy of that document after it is prepared?

A Yes, I do.

Q And does that indicate -- does that have separate pages for each of the stops made by the driver?

A It has a separate page for every day. If he made more than one stop on a particular day --

MR. RITCHIE: Your Honor, I'd offer these into evidence at this time.

MR. MEISELMAN: Your Honor, may I have a voir dire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. MEISELMAN:

Q Mr. Anderson, do you know, sir, who ordered this material?

A No, I don't.

Q Do you know to whom it was consigned?

A According to the bill of lading, that's the only way I'd know.

Q That would be, sir, Merkel Electric; is that correct? Or Merket Electric?

A Yes.

Q And Merkel Eelctric has an office in Port

Jefferson?

A I don't know if they have an office but that's where it was supposed to go to.

Q To Merkel Electric in Port Jefferson?

A It could be a --

Q Could be anything? What was the date, sir, that this merchandise was delivered to Merkel Electric or Merket Electric in Port Jefferson?

A 4/26/72. April 26, '72.

Q April 26th or is it, I believe, April 21st?

A April 26th, '72.

MR. MEISELMAN: If your Honor please, I respectfully object on two grounds. One, it is outside the period of the indictment, and two, there is no connection. There is no foundation laid for the same.

MR. RITCHIE: Your Honor, I'd ask that it be admitted subject to connection. The connection will be made today with the testimony of George Little.

THE COURT: No. It may be received. It is outside -- it is within the period described by paragraph 3 of the indictment. But that does not mean that it is not an initiatory document which would be drawn into the scope of paragraph 3.

MR. MEISELMAN: I would renew my objection,

if your Honor please, with respect to the -- no foundation having been laid for its receipt with respect to the defendant.

THE COURT: I take it the foundation for it is Section 1732 of Title 28.

MR. RITCHIE: That's correct, your Honor.

THE COURT: It will be received.

THE CLERK: Now Government's Exhibit 1 in Evidence.

(So marked.)

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MR. RITCHIE: Your Honor, I do not know whether the record reveals that I was offering Government's Exhibit 1 and 2 in evidence.

THE COURT: I do not know that you looked at Exhibit 2, had you, Mr. Meiselman?

MR. MEISELMAN: No, I don't think I did.

THE COURT: That's the driver's log.

(Document shown to counsel.)

MR. MEISELMAN: May I impose upon your Honor to see whether I could also look at Government's Exhibit 1 for identification?

THE CLERK: 1 in evidence.

THE COURT: Certainly.

(Document shown to counsel.)

MR. MEISELMAN: May I ask one or two questions, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. MEISELMAN:

Q I show you what has been marked Government's Exhibit 1, and I ask you, sir, to look at the third page, and can you tell me what that document purports to mean?

A That's a delivery receipt for part of the shipment that he hauled to Indiana.

Q That delivery receipt has indicated thereon, does it not, that that is the first stop for the driver that day?

A Supposed to be, yes.

Q It so says on the document?

A Yes, sir.

Q That should tally with the driver's daily log, should it not?

A This document is typed up before he has delivered it, though.

Q How do you know it would be the fourth stop in Port Jefferson, or was that added afterwards?

A Which is the first stop?

MR. MEISELMAN: I haven't gotten to that yet.

Q According to the document in front of you, it indicates -- does it not -- that a delivery to Port Jefferson was the first stop, and I quote from the document; is that correct?

A No --

MR. RITCHIE: I object. This is not proper voir dire. This is proper cross-examination.

THE COURT: He is trying to find out whether the record qualifies for admission into evidence, whether there is some irregularity that would result in its exclusion, I take it.

MR. RITCHIE: Yes.

MR. MEISELMAN: No objection.

THE COURT: Exhibit 2 shall be received on the same basis.

*** THE CLERK: So marked.

MR. RITCHIE: Your Honor, I would request permission to have Mr. Anderson read just certain specific parts of this ten-page document.

THE COURT: If that is the quickest way to do it.

MR. RITCHIE: Yes, your Honor.

DIRECT EXAMINATION

BY MR. RITCHIE: (continued)

Q Could you read for us the following pieces of information:

Who the shipper was on this shipment?

A Velmont Industry, Nebraska.

Q What was the fourth stop?

A Merket Electric, Port Jefferson, New York.

Q Where was the fourth delivery made, what was the location?

A McNamara Buick-Pontiac, Route 347, Port Jefferson, New York.

Q What is the signature of the individual acknowledging receipt?

A It is signed, "Merket Electric, George Little"--

THE COURT: What was that name?

THE WITNESS: George Little, L-i-t-t-l-e.

Q What is the date next to that receipt?

A April 26, 1972.

Q What's the quantity of the goods delivered?

A Says "25 rolls and roll material."

MR. RITCHIE: Your Honor, I have no further questions.

MR. MEISELMAN: No questions, your Honor.

MR. FISCHETTI: Just briefly.

CROSS EXAMINATION

BY MR. FISCHETTI:

Q Hunt Transportation is in Omaha, Nebraska?

A Yes.

Q Do you also live in Omaha, Nebraska?

A Yes, I do.

Q Can you tell us when the Government called you and asked you to come down here?

A Originally I was here in January.

Q This last time.

A This last time, last Wednesday.

Q Did you fly down?

A Yes, I did.

Q By yourself?

A I came with my wife.

Q You are staying at a hotel here?

A Yes, we are.

Q Tell me, Mr. Anderson, who paid for your trip?

A Who paid for the trip? I paid for the trip.

Q Yourself and your wife?

A Yes, so far.

Q Do you expect reimbursement from the Government?

A According to the letter that I got, yes.

Q Who sent you the letter?

A It was delivered -- It was a subpoena delivered to our office.

Q Was it your understanding, Mr. Anderson, that the Government would pay for yourself and your wife?

A No, myself -- Just so much a mile, and so much a day. I believe it is ten cents a mile and $20 a day.

Q For your stay here in New York?

A Right.

MR. PISCHETTI: I have nothing further.

THE COURT: Anything else?

MS. SELTZER: No questions.

MR. LEONE: No questions.

MR. RITCHIE: I just have one question.

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An Anderson - redirect

THE COURT: Is this cross-examination?

REDIRECT EXAMINATION

BY MR. RITCHIE:

Q Is it your understanding that this is what every witness gets when he testifies?

MR. FISCHETTI: Objection.

MR. NEISELMAN: Objection.

THE COURT: I think I told you earlier that they're compensated exactly on the same basis that you are, $20 a day, ten cents a mile. That is what you said, I think?

THE WITNESS: Yes.

MR. RITCHIE: I have no further questions, your Honor.

F R A N K S I F A R E L L I , having been first duly Sworn by the Clerk of the Court, testified as follows:

THE CLERK: State your full name and spell it, please.

THE WITNESS: Frank Sifarelli, S-i-f-a-r-e-l-l-i.

DIRECT EXAMINATION

BY MR. RITCHIE:

Q Mr. Sifarelli, what is your occupation?

A Currently I am employed by the Fireproof Products Company as a Product Manager.

Q How long have you been so employed?

A With the firm, I have been employed approximately 17, 18 years, and in my present position, approximately 3 years.

Q And what particular products are you the manager of?

A Steel joists and steel roof decks, d-e-c-k.

Q If you know, does Fireproof Products, Incorporated manufacture its own joists?

A We do not do any manufacturing at all. We act as a distributor, only.

Q For whom are you dsstributors of joists?

A Guille Steel Products Company of Virginia Beach, Virginia.

Q During 1972, did your company have occasion to take an order for joists from a Harold Goberman?

MR. MEISELMAN: I make objection to that question, and I particularly call to your Honor's attention paragraph 1, particularly starting on the fifth or sixth line from the bottom of that paragraph.

MR. RITCHIE: Is this of the Indictment?

MR. MEISELMAN: Yes.

I respectfully submit that the question is outside the purview of the Indictment.

THE COURT: No, the question may be asked and

answered, because we are dealing not with exact dates.

MR. MEISELMAN: I am not referring to dates, your Honor. I am referring to that portion of Paragraph One which starts after the comma on the sixth line from the bottom of that paragraph.

THE COURT: Yes.

MR. MEISELMAN: Where it states that the HarMac Contracting Corporation transported, moved --

THE COURT: The objection is overruled.

MR. MEISELMAN: Exception, your Honor.

MR. RITCHIE: Could you read back the question, please.

(Question read.)

A No, sir, we received an order from a company called LenAl Construction Company.

Q Now, during your course of duties as head of the joists department, do you have custody of documents relating to the sale of joists to different individuals?

MR. MEISELMAN: I apologize for not rising fast enough. I would move to strike the witness' answer.

THE COURT: That motion is denied.

MR. MEISELMAN: Exception.

Q As head of the joist department, do you have custody of documents relating to the value of joists to various individuals, order forms, and things like that?

A Yes, sir.

Immediately after an order is received, it is my primary function to take control over that particular job.

THE CLERK: Documents marked for identification as Government's Exhibits 3 --

MR. RITCHIE: We will have to mark each one of them separately.

THE CLERK: One document marked for identification as Government's Exhibit 3.

Another document marked for identification as Government's Exhibit 4.

Another document marked for identification as Government's Exhibit 5.

Another document marked for identification as Government's Exhibit 6.

(So marked.)

Q I show you now what has been marked -- a packet of Exhibits -- marked Governments Exhibits 3, 4, 5 and 6 for identification. I ask you with respect to them, do you recognize them?

A Yes, I do.

Q What is Government's Exhibit 3?

A Exhibit number 3 is a purchase order made out by my firm to the Guille Steel Products Company, Incorporated,

Virginia Beach, Virgina, and it covers approximately two and one quarter tons steel joists that we received from LenAl.

Q Exhibit 4?

A Would be for the same firm, Guille Steel Products, and for approximately forty tons for a new building, for the same contractor, LenAl Contractors.

Q What's Government's Exhibit 5?

A Exhibit number 5 is an acknowledgement order from Guille Steel Products, mailed to us, and it is a preliminary job sheet that they mailed to us after they received the two prior purchase orders that I told you about.

Q What's Government's Exhibit 6?

A Government's Exhibit 6 is an acknowledgement, again, of the second purchase order that we sent to Guille Steel.

Q Can you tell us how these -- You deal on a regular basis with Guille Steel?

A Yes, sir.

Q In connection with Government's Exhibits 5 and 6, whenever you receive -- whenever you give a purchase order to Guille, you receive a similar type piece of paper?

A Yes.

These papers represent the initial sale on a particular job, and it is a form of communication between us

in the Bronx, New York, and Virginia.

Q Can you tell us how these documents are prepared -- those four documents?

A Well, the purchase orders, which are made out to Guille Steel Products, are prepared after we initially receive an order, and they are typed up by the secretary of the office, and it is done on all jobs that we receive, and usually within a week to ten days after we sent out purchase orders down to Guille Steel, which forms the basis of the order as far as they are concerned, and gives them our purchase order numbers and the job addresses, our job numbers, and it tells them the kind of materials involved, they then send us an acknowledgement of that order, and they do this on all purchase orders that we mail to them, and it confirms the information that we have mailed them, and also shows their job numbers on that, which are referred to later on in the processing of the order.

Q Are those documents kept by you in the regular course of your business?

A Yes, I send them out on all jobs, and I get the acknowledgements back on all the jobs.

(continued on next page.)

Q Now, I show you what has been marked -- let me mark it first.

THE CLERK: Marked for identification as Government's Exhibit 7.

Q I show you what has been marked as Government's Exhibit 7 for Identification and I ask you if you recognize that document.

A Yes, I recognize it. It is a series of invoices for the month of April that we received from the Giles Steel Products Company.

Q In among those is there any reflecting that purchase order from Len-Al?

A The last sheet shows an invoice in the amount of $9,755 for material that was shipped to the new building for McNamara Buick-Pontiac.

Q Is that reflective of those purchase orders that have been marked Government's Exhibits 3 and 4?

A Yes, they show our purchase order number as 4375, which is the one that we had mailed to them.

Q Now, with respect to that document, did you place any writing on that document after you received it?

A This is an invoice that we received. Our bookkeeper has an ink stamp that she puts on. The bills are given to me to O.K. and then the bookkeeper would pay the bills.

Q Now, are those records, Government's Exhibit 7, kept by you in the regular course of your business?

A Yes, only while they are still active. After I O.K. them, I pass them to the bookkeeper. She pays the bills and they are filed away.

Q Were those documents given to the United States by you in the past?

A Yes.

Q From your files?

A Yes.

MR. RITCHIE: Your Honor, I would offer Government's Exhibits 3, 4, 5, 6 and 7 into Evidence.

MR. MEISELMAN: Before I object, may I ask several questions on voir dire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. MEISELMAN:

Q Mr. Cifarelli, in the spring and summer of 1972, were you the office manager of Fireproof Products?

MR. RITCHIE: Objection, your Honor, irrelevant to the scope of the voir dire.

THE COURT: He wants to find out whether this matter of record is within his function, I take it.

MR. MEISELMAN: Yes.

3 Cifarelli-direct

MR. RITCHIE: Your Honor, I would still object. That would not be properly --

THE COURT: Yes, if he cannot authenticate the documents, they cannot be received.

MR. RITCHIE: He testified that they were from his files. Whether he was the manager --

THE COURT: Objection overruled. Let us move along quickly.

MR. RITCHIE: Yes.

THE WITNESS: Would you repeat the question.

Q I believe it was, Mr. Cifarelli, in the spring and summer of 1972 were you the office manager of Fireproof Products, your employer?

A You mean manager of the joist department?

Q Let me put it this way --

A We do have an office manager.

Q What is your title now?

A Manager of the joist products.

Q Was that your title in the spring and summer of 1972?

A No, sir.

Q What if anything did you do for your employer in the spring and summer of 1972?

MR. RITCHIE: Objection as irrelevant.

4 Cifarelli-voir dire

THE COURT: Let us get down to the case here. All we are interested in is the shipments here and whether he has competent evidence of it.

Q Did you have custody of those documents in the spring and summer --

THE COURT: I think he said he prepared it.

THE WITNESS: The primary function of the unit manager is to prepare these papers.

Q But you were not the joist manager?

A In the spring and summer of 1972, no, sir.

Q Did you have custody of any or all of these documents in the spring and summer of 1972?

MR. RITCHIE: Objection as irrelevant.

THE COURT: Overruled.

Will you please answer the question.

A Well, in the spring and summer there was a Mr. Clarence Burke --

Q I asked you if you were the manager then and did you have custody of these documents in the spring and summer of 1972?

A No, sir, that was not my primary function at the time.

MR. MEISELMAN: I object on that ground and on the further ground that it is not within the purview

5 Cifarelli-direct

of the indictment, particularly Paragraph 1 and the dates.

MR. RITCHIE: He need only be the custodian of records at the time they are subpoenaed --

THE COURT: All he has to do is be familiar with the records and know whether or not it is the regular course of business of the company to keep such records and whether or not he knows that they are kept in the ordinary course of such business.

Do you know those things?

THE WITNESS: Yes, the system --

THE COURT: How long have you been with the company?

THE WITNESS: I have been with the company 17, 18, 19 years.

THE COURT: What if any connection did you have with the processing of these particular orders?

THE WITNESS: My predecessor --

THE COURT: No, what if any connection did you have with the processing of these orders?

THE WITNESS: In the spring -- the summer and spring of 1972 we had a system of processing papers and to this date we still maintain that system.

THE COURT: Did you work on these yourself, can

you remember?

THE WITNESS: I may have not -- on this particular job?

THE COURT: So now, what is the basis of your testimony to the jury here, these came from the company's files or what?

THE WITNESS: Yes, these papers were kept by the manager of the joist department.

THE COURT: And they come from his departmental files, which are now in your custody?

THE WITNESS: It comes from files that are kept by the manager of the steel joist department. I would assume their responsibility --

THE COURT: Their what?

THE WITNESS: I would assume their responsibility in the latter part of 1972 --

THE COURT: You are plant manager and those are the records of the department that you are now manager of?

THE WITNESS: Yes.

THE COURT: Very well.

(Continued on next page.)

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MR. MEISELMAN: May I ask just one more question?

THE COURT: Certainly.

Q These documents which you have produced, Mr. Sifarelli, they show that the purchase was by a contractor called LenAl,Contractor Co., Inc. Is that correct?

A Yes, sir.

Q It shows no other name of any purchaser or contractor, does it, sir?

THE COURT: Just glance through the papers quickly because Mr. Meiselman's question is, first to last, on those papers, it is all this LenAl Contractors?

THE WITNESS: All these papers show LenAl Construction.

THE COURT: No other name?

THE WITNESS: On these particular papers?

THE COURT: Yes, and the shipment that they call for, if made as the papers suggest, was made to what point, the deliveries?

THE WITNESS: I know before the material was ultimately, the name was changed.

MR. MEISELMAN: Move to strike, if your Honor please. We are referring to the documents that he has before him.

THE COURT: Yes, just stick with the documents.

THE WITNESS: According to these documents, it shows LenAl Contracting Company.

THE COURT: For the materials, what materials went to where, where did they go?

THE WITNESS: The material was shipped to a new building for McNamara Buick-Pontiac, north side of Nesconsett Highway, Port Jefferson Station, Long Island; and also the material was shipped to a used car office on the north side of Nesconsett Highway, also in Port Jefferson Station, Long Island.

THE COURT: And the date, does that show the dfte when it was delivered there?

THE WITNESS: The date would not appear on these documents, except that I may add that the bill was paid on May 3, so I would say it would be the month of April, April of '72.

THE COURT: I think that gives you what you want, doesn't it, Mr. Meiselman?

MR. MEISELMAN: It does, sir.

I make objection, your Honor, on the grounds previously stated.

THE COURT: The objection is overruled. The points that Mr. Meiselman wants to draw to your attention here are two, in this case; first, that the buyer, or

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Sifarelli -

seeming buyer, or the materials was LenAl, a construction or contracting company --

THE WITNESS: Company, Inc.

THE COURT: -- and that judging backwards from the invoice, the delivery must have been made some time in late April of 1972, and, in any event, before May 3, 1972, when they were invoiced.

THE WITNESS: From these papers, yes.

THE COURT: All right, they will be received.

THE CLERK: Government's Exhibits 3, 4, 5, 6 and 7 in evidence.

**** (So marked.)

DIRECT EXAMINATION

BY MR. RITCHIE: (continued)

THE COURT: I think Mr. Ritchie's point is that they came from Virginia.

MR. RITCHIE: Yes, your Honor.

Q Now, Mr. Sifarelli, could you just tell us the quantity of goods ordered and paid for?

A Regarding the steel joists only, the material would be in excess of $10,000.

Q Do you have an exact figure?

A No, sir, it wouldn't show up on these papers.

MR. RITCHIE: Does your Honor want to see those

documents?

THE COURT: If you would, yes, after counsel finish with them.

MR. RITCHIE: I had given them to counsel.

THE CLERK: Documents marked for identification Government's Exhibits 8, 9, 10.

(So marked.)

Q I show you what has been marked as Government's Exhibits for identification 8, 9 and 10.

With respect to Government's Exhibit 8, what is that document?

A Exhibit 8, again, is a purchase order made out by my firm to the Rollform, R-o-l-l-f-o-r-m, Products, Inc., 200 Park Avenue South, New York, with offices in Boston.

Q And what is Government's 10?

A It is also a purchase order made out by my firm to Rollform Products, again, for the McNamara Buick job, and the product involved is a steel roof deck.

Q How much steel roof deck was ordered?

A Dollars and cents?

Q Yes.

A It doesn't show exactly the amount, but it would be in excess of $5,000.

Q In connection with Government's 9, what is that

document?

A Exhibit number 9 is a, what we refer to, I believe, as a bill of lading, which is made out by Rollform Products, Inc., Malverne, Pennsylvania, which is the plant where the material is made, allocated, and shipped from, and it shows the number of pieces, the length, the consignment to destination; where it's going.

Q In connection with those three documents, do you know how Government's 8 is prepared?

A Yes. Government's Exhibit number 8 is prepared the same as the joists purchase order. These are typed out in the office just prior to after we receive an order, and it is a communication with the plant in Malverne, Pennsylvania, which shows the existence of an order, the job delivery address, with instructions, and a cutting list of the materials for them to fabricate and ship.

Q In connection with Government's 9, how is that document prepared?

A Excuse me, I didn't hear you.

Q In connection with Government's Exhibit 9, how was that document prepared?

A This is a bill of lading made by the manufacturer on all jobs, and it is a delivery slip, sort of, and it covers the material on those purchase orders.

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Q Does your company deal on a regular basis with Rollform Products, Inc.?

A Yes, sir, we do.

Q In connection with all such orders for steel decks, do you receive a similar type purchase order?

A On all, we would receive a purchase order showing the same information here, and we would also always have a copy of the shipping order.

Q With respect to Government's 10, how is that document prepared?

A Exhibit 10 is a purchase order. Again, it is made up -- on all orders we receive, it is made up on, it is a bill of the material -- the material type of form we make out, it shows the material required, also the job address and where it is supposed to be shipped to, and it also shows the job numbers as a form of communication.

Q Do all three of those documents relate to one job?

A Yes, sir. the same location.

Q Who was the purchaser of those goods?

A The purchaser on purchase order number 4515 was purchased by a LenAl Contractors, Inc., and after it was typed, it has been changed to HarMac, that is, H-a-r-m-a-c. The material should be shipped to McNamara Buick, Nesconsett Highway,

one mile east of Terry Hill Road, Port Jefferson Station, Long Island.

Q Are those documents 8, 9 and 10 also maintained in your files in the regular course of your business?

A Yes, sir, these papers, all the order that come in, it's the way we keep track of them, and it also helps us in processing the orders.

MR. RITCHIE: Your Honor, I would offer these into evidence.

VOIR DIRE EXAMINATION

BY MR. MEISELMAN:

Q Mr. Sifarelli, the change from LenAl to HarMac was in ink, was it not, or in pencil? It was made in pencil, was it not, sir?

A If my memory is right, on one of them it was changed inpencil, and the other one it is typed it as HarMac.

Q Take a look at the purchase order. I believe that is Government's Exhibit 10 for identification. The name LenAl is stricken out and the word HarMac is written in in pencil, is that correct, sir?

A Yes, sir.

Q Did you do that?

THE COURT: Can you recognize --

A It is not initialed. I don't recognize the hand-

writing.

Q You don't know who did that?

A I don't recall.

Q You don't know who did it?

A No, sir, it's not initialed, and I don't recognize it as my handwriting.

Q And you don't know who did do it?

A It was someone employed by the firm.

Q Sir, I asked you if you know who did it.

A No, sir.

Q Do you know when it was done?

A There is no date on there as to when it was done.

MR. MEISELMAN: Thank you, sir.

Q With respect to the other documents, if I were to ask you the same questions now that I asked you before, would your answers be substantially the same?

MR. RITCHIE: Objection, your Honor.

MR. MEISELMAN: I am trying to save some time on the voir dire, your Honor.

MR. RITCHIE: Your Honor, I've got to object to that question because I don't understand what it means.

THE COURT: I thought the second one was supposed to have been typed, I don't know.

Sifarelli - voir dire

MR. MEISELMAN: It is changed in pencil, your Honor. No date, no identification.

THE WITNESS: On this one it is changed.

MR. MEISELMAN: Yes.

THE WITNESS: Are you looking for a date?

MR.MEISELMAN: I believe Mr. Ritchie objected?

THE COURT: He wants to know, do you know anything about this change on the other document?

THE WITNESS: The original contractor or customer was LenAl Contractors, Inc., and some time after March 8th, it was changed to HarMac Contractors.

BY MR. MEISELMAN:

Q You don't know when or by whom this change was made?

A No, sir, I don't.

MR. MEISELMAN: I will object to this and the other documents, your Honor please, on the grounds already stated, and on the additional ground that the document has not been properly identified, and a foundation has not been laid.

MR. RITCHIE: I will withdraw my offer into evidence at this time.

BY MR. RITCHIE:

Q I show you Government's Exhibit 8 for identifica-

tion. How is the shippee on Government Exhibit 8?

THE COURT: Consigneee.

MR. RITCHIE: Yes.

A The material was shipped to HarMac Contractors Company, Inc., H-a-r-M-a-c.

Q Do those two documents relate to one order?

A Yes, they are both purchase orders on the same job.

MR. RITCHIE: I renew my offer into evidence, your Honor.

THE COURT: No. Are both purchase orders --

MR. RITCHIE: Relate to the same job, your Honor.

THE COURT: To the same delivery point, same job site?

THE WITNESS:Same job site, same delivery site.

THE COURT: All right.

VOIR DIRE EXAMINATION

BY MR. MEISELMAN: (continued)

Q Is there any document in your file, Mr. Sifarelli, which shows the basis, the foundation, the reason, or anything else, of a change from LenAl to HarMac, and where?

MR. RITCHIE: Your Honor, I object to the form of that question.

THE COURT: He may answer it. Anything that you

know of?

THE WITNESS: I don't know, I don't have first-hand knowledge of why it was changed, no, sir.

THE COURT: That is, in writing?

THE WITNESS: No, sir.

MR. MEISELMAN: I object, if your Honor please.

THE COURT: The objection is overruled.

MR. MEISELMAN: Exception.

THE CLERK: Now, Government's Exhibit 8, 9 and 10, in evidence.

*** (So marked.)

BY MR. RITCHIE:

Q With respect to Government's 8, 9 and 10, is there any indication on any of those documents as to who actually received and signed for the goods shipped by Rollform?

MR. MEISELMAN: I will object to the form of the question. The documents will speak for itself, unless the witness has firsthand knowledge.

THE COURT: It is a lot easier to have him read it to the jury than it is to pass it through to the jury.

A Exhibit number 9 shows a signature of H. Goberman.

MR. RITCHIE: I have no further questions, your Honor.

THE COURT: Do you renew the offer?

I think you had withdrawn the offer.

MR. RITCHIE: I had withdrawn the offer, and I offered it again in evidence, and your Honor overruled the objection.

THE COURT: All right.

THE CLERK: Government's Exhibits 8, 9 and 10 are in evidence.

CROSS EXAMINATION

BY MR. MEISELMAN:

Q Do you know anyone by the name of Harold or Harry Goberman, by that name or any other name?

A The name Goberman sounds familiar.

Q Sir, I direct you to the name Harry or Harold Goberman, particular; do you know that man?

A No, sir.

Q Do you know the name H., Harold or Harry Goberman, from your knowledge?

A I have a recollection in my day-to-day business of hearing the name Goberman.

Q Do you hear the name Allen Goberman in connection with LenAl, or do you hear the name H. Goberman, or Harry Goberman in connection with something else, or can't you tell the difference?

MR. RITCHIE: Objection to the form of that

question, your Honor.

THE COURT: It is a little complex.

MR. MEISELMAN: Withdrawn.

Q The Goberman that you have have heard about in your business, is that Allen Goberman?

A The best I can recall, it would be a Mr. Goberman.

Q But you don't know which?

A No, sir.

Q Could it be Izzie Goberman?

A Possibly.

Q Sir, do you know a man by the name of Thaddeus Lemansky?

A Yes, sir.

Q Tell me, sir, the papers which you brought with you today, did you bring your entire file, or did you bring just -- Withdrawn.

Did you bring your entire file?

A No, sir.

Q What papers did you bring, that which Mr. Ritchie asked you to bring?

A I didn't bring any papers with me today.

Q The papers that you have before you now have been in the custody or possession of Mr. Ritchie?

A Yes, sir.

14 1 Sifarelli - cross

Q A file such as yours would have, would it not, plans or specifications, or both, with respect to the steel which you were to purchase and deliver on behalf of this order; is that correct?

A The plans would not be part of the file that I keep, but it would be in the Enginerring Room or in the Drafting Room.

Q But your company would have such plans, and they would have such drawings, and they would have such specifications, is that correct?

A Yes, sir, we would require that on all jobs we get.

Q Did you deliver that to Mr. Ritchie?

A Well, again, like I say, it is not part --

THE COURT: All he wants to know is, Did you deliver them to Mr. Ritchie?

THE WITNESS: No, sir.

Q From the papers which you gave to Mr. Ritchie, it would be impossible to tell, would it not, Mr. Sifarelli, whether the steel which you say you delivered was in conformity with the plans of the structure?

MR. RITCHIE: Your Honor, I am going to object and ask for the relevancy of that question.

THE COURT: It is not relevant, I see it, Mr.

Sifarelli - cross

Meiselman.

Q I believe you testified that you knew a Thaddeus Lemansky?

A Yes, sir.

THE COURT: What was that last name?

MR. MEISELMAN: L-e-m-a-n-s-k-i, I believe.

Q Was he the salesman on this job?

A Yes, sir. He is our Long Island Area salesman.

Q Do you know as a fact that at the time he was the salesman on this job, employed by you, he was the Engineer on this job for the owner?

MR. RITCHIE: Objection, your Honor, on the grounds of relevance.

THE COURT: Yes, it is quite irrelevant. The objection must be sustained.

Q Do any of the papers which you furnished Mr. Ritchie have the initials on them "R.C.D."?

A Yes, sir, I recall seeing a document yesterday.

Q Is that document in court today?

A No, sir, I don't see it here.

Q Did you see it in Mr. Ritchie's possession?

A Yes, sir.

MR. MEISELMAN: Do you have it, Mr. Ritchie?

MR. RITCHIE: If Mr. Meiselman can inform me

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of exactly what paper he is looking for, I may solve this mystery.

THE COURT: Perhaps you can tell him.

Q Would you describe that document --

THE COURT: Please, I want to save time.

MR. MEISELMAN: I don't know, I haven't seen the document, your Honor, but there is reference to the document.

Q Can you describe the document, Mr. Sifarelli?

A Well, there was a document that was introduced as evidence, and it is a --

Q Please. The document you saw in Mr. Ritchie's possession, can you tell us what it was that had the initials R.C.D. on it?

A It was a white sheet of paper.

Q And is this the document (handing to witness) that has been handed to me by Mr. Ritchie?

MR. RITCHIE: Could we have that marked for identification, please?

MR. MEISELMAN: I beg your pardon. May I have it marked for identification,myour Honor?

THE CLERK: Marked for identification as Government's Exhibit 11.

MR. MEISELMAN: No, no. You are offering it,

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sir?

MR. RITCHIE: I just want to have it marked for identification purposes.

THE COURT: Defendant McNamara's Exhibit A for identification.

THE CLERK: Defendant McNamara's Exhibit A for identification.

***

(So marked.)

GR fls

(continued on next page.)

T6R1PM
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Q What is a Form A in your business, Mr. Sifarelli, or in your firm?

A Form A is what we commonly refer to as the initial order that the company receives from the salesman, which starts the flow of paper work.

Q I show you Defendant's Exhibit A for identification. Do you see any initials there, R.C.D.?

A Yes, sir.

Q And next to the initials R.C.D., what does it say?

A It reads, "Shipment ordered to job site, together with our 1061-2-2. Do not release until approved by Credit Department per R.C.D., February 29, 1972."

Q It couldn't be --

THE COURT: What is the date on that?

THE WITNESS: February 29, 1972.

Q That means to you, does it not, sir, that this steel, or item, whatever it was, could not be released, according to the orders of R.C.D., until there was credit approval; is that correct?

A Just as a point of information --

Q Well, is that correct, sir, or not?

A Well, as a point of information, we verify with the Credit Department prior to ordering of any material.

THE COURT: No. But Mr. Weiselman's question is, that meant just what it said.

THE WITNESS: Yes, sir.

THE COURT: All right.

Q Who is R.C.D.? If you know?

A R.C.D. is the Assistant Treasurer of Fireproof Products Company, in charge of the Credit Department.

Q Does your company have records which indicate that this merchandise was not released until you received a personal irrevocable letter of credit from Thomas McNamara?

A I'm sorry, I have no knowledge of that.

Q Could you check -- Did you check your records before coming here today?

A As I recall, it wasn't --

Q The question is, sir, Did you check your records before coming here today?

MR. RITCHIE: Your Honor, I'm going to object to any -- Well, I'll withdraw the objection.

A (continuing) No, sir, I did not check.

Q When is the last you looked at those records?

THE COURT: If ever.

Q If ever? I stand corrected, properly.

A I think it was January, '73.

Q The last you looked at it?

A Yes, sir.

Q Where are those files, sir?

A The files are kept in the office in a file cabinet.

Q You knew that you would be coming here to testify?

THE COURT: He was not necessarily requested to produce anything except these documents.

Q Did you receive a subpoena in this case, Mr. Sifarelli?

A Yes, sir.

Q Would you produce it, please?

A Yes.

THE COURT: That's it.

Let's hurry up, please, Mr. Meiselman.

MR. MEISELMAN: Yes, sir.

Q This is a subpoena which is four -- The subpoena you've produce is for an individual to appear. It says nothing about records; is that correct?

A It's a subpoena addressed to"Custodian of Records, or G. Sifarelli."

Q Does it say anything about records?

A It says, "To Custodian of Records."

Q Yes, but does it say anything about records to produce? That's an individual subpoena, and will the Court

take notice of that?

THE COURT: From here?

MR. MEISELMAN: May I mark it for identification, your HOnor?

THE CLERK: Marked for identification as Defendant McNamara's Exhibit B.

*** (So marked.)

Q Now I show you Defendant's Exhibit B for identification. This doesn't ask you for any records at all; does it?

THE COURT: Does it specify the records you are to produce?

THE WITNESS: No, sir.

Q Did you ever receive a subpoena ducas tecum; that is, a subpoena to produce records?

A I think in January, '73, I think that's the way it read.

Q You have records in your office that pertain to the transaction you've testified to which you have not produced here today; is that correct?

THE COURT: That still is not the question.

The question is, what records was he required to produce.

MR. MEISELMAN: I'll be glad to ask that question,

sir.

Q What records were you required to produce when you came here today?

A Today there was no request for any records.

Q You had already given the Government your records; is that right? Some time ago?

A Yes, sir.

Q Do you know what you gave them?

A Well, I recall -- I think I brought them with me.

Q Did you bring your entire file with you?

A Last time I did, yes sir.

Q Did you leave it with the Government?

A No, sir, they took just these certain items you see here.

Q In other words, the Government took out of the records what they wanted, and gave you back the rest; is that right?

A No. The file I brought with me last time, these items were picked out for Exhibits.

Q I asked you, sir, --

A I took the folder back.

Q Exactly. That's what I asked you. Isn't that right?

A Yes, sir.

Q You still have that file?

A Yes, sir.

MR. MEISELMAN: If your Honor please, I have no further questions of this witness at this time.

May he be respectfully excused, and requested to return with the other documents?

THE COURT: No. His compliance with the subpoena is completed. It is a subpoena of the Government. He has performed his duties under it.

MR. MEISELMAN: May I respectfully request, your Honor, that the witness--

THE COURT: We can discuss that later. If it has any relevancy, you may --

MR. MEISELMAN: Until the witness leaves the courtroom, may I have a side bar, your Honor?

THE COURT: No. We will get ahead with this now.

Mr. Sifarelli, you will be available on the telephone?

THE WITNESS: Yes, sir.

THE COURT: You will return to your office now?

THE WITNESS: Tomorrow morning, sir.

MR. MEISELMAN: May I have your telephone number, sir?

THE COURT: Would you wait a bit then? We may get a message to you.

Any further questions?

MR. MEISELMAN: No, sir, thank you.

THE COURT: You may step down.

MR. RITCHIE: Your Honor, may I have Government's 1 in evidence? I'm going to -- Thank you.

THE CLERK: Yes, sir, if you will step over here, please? If you'll stop right there, face me, and raise your right hand?

G E O R G E L I T T L E , having been first duly Sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RITCHIE:

Q Mr. Little, what is your occupation?

A I'm an electrician.

Q By whom are you presently employed?

A Merkel Electric.

Q For how long have you been employed by Merkel Electric Company?

A 19 years.

Q While working for Merkel Electric Company, did you ever do work for a McNamara Buick-Pontiac showroom job site?

A Yes.

Q Was that during the course of the year 1972?

A Yes.

Q What equipment or what goods were you installing on that job site?

A I was wiring the building and the site light.

Q Can you explain what you mean by site lighting?

A Poles and lights, lights on the building that project light off, you know, into the area where, the parking area, or working areas.

Q Do you know from what company you ordered this site lighting?

A Yes; from General Electric.

Q Did there come a time that you received any goods on that order?

A Yes, received them.

Q I show you now what's already been marked as Government's 1 in evidence. Directing your attention to the 6th page of that Government's Exhibit, I ask you if any of your writing appears thereon?

A Yes. That's my signature, that I acknowledged the delivery.

Q Where does that appear on the 6th page, top, bottom, left?

A On the bottom, alongside of the firm Merkel Electric.

Q That's your name, George Little?

A That's my signature, too.

Q When did you receive those goods?

A The date I signed on there, when I signed it, 4/26/72.

Q Were those goods ever installed on that job site?

A Yes. I installed them. My firm installed them. I didn't install them myself.

THE COURT: What was that?

THE WITNESS: My firm installed them. Merkel Electric installed them.

Q When were those -- What goods were received by you on April 26th?

A This was a -- the poles, the light poles. This was not the fixtures. This was the poles, the six 25-foot, five 30-foot, and brackets and equipment, you know, goes to the supporting the poles, and stuff like that. Two boxes of parts. You know, loose parts.

Q When were they installed by your company?

A Well, I have a record here which shows that I installed them on July 27, 28. I don't remember the date from memory. Only the fact that I have, you know, a bill that I paid

to install, hire a truck to install them. That's how I know.

Q But you did hire that truck that you have the record on, to install those light poles; is that correct?

A Yes.

Q And the day that truck was hired was July 27; is that correct?

A Yes.

Q So it was on July 27 or July 28 that those light poles were installed on that job?

A Were erected, yes.

MR. RITCHIE: I have no further questions of this witness, your Honor.

CROSS EXAMINATION

BY MR. MEISELMAN:

Q Mr. Little, I presume that when the Government requested you to appear here today it was by subpoena?

A Yes, sir.

Q Did they request you in that subpoena to produce your papers and records?

A No, sir.

Q They did not?

A No, sir.

Q Did they have your papers and records before today?

A Yes.

Q You had given them at some time prior? Did you give them your entire file, sir?

A No, sir.

Q Did you bring any records with you today? Other than what you gave them before?

A Yes, sir. The history of -- In other words, my records of the job, entire manpower records, and other bills.

MR. MEISELMAN: May I have this paper marked as an Exhibit, please?

THE CLERK: Yes, sir.

MR. MEISELMAN: For identification.

THE CLERK: Document marked Defendant McNamara's Exhibit C.

*** (So marked.)

Q I show you, sir, Defendant McNamara's Exhibit C for identification. It is a photostat copy.

Can you tell me, sir, whether you recognize what it is?

A I recognize it's a proposal for electrical work and it is the proposal that my firm, Merkel Electric, made when we -- when we were trying -- when we were attempting to obtain, you know, the work.

Q And that proposal, when signed by the purchaser,

makes the contract between you; is that correct?

A Well, the -- It makes it -- Let me see.

MR. RITCHIE: Your Honor, I'm going to object. This calls for a legal conclusion.

THE COURT: Just ask him who signed it.

Q Who signed it, sir?

A The signature down at the bottom is Louis Frandoli.

Q Who is he, sir, if you know?

A At the time, he was the Vice President of Merkel Electric, as it states.

(continued on next page.)

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Q Did anybody sign on behalf of the customer?

MR. RITCHIE: Your Honor, I'm going to object to any further questions.

A (continuing) Yes.

MR. RITCHIE: On the contents of this document.

THE COURT: No. Let's get it over with, quickly, for heaven's sake.

A (continuing) Yes.

Q What is the signature, sir?

A H. Goberman.

Q To whom was the proposal made?

A Attention Mr. Goberman, Mr. Harry Goberman.

Q That's the only person named to whom attention is called in this proposal; is that correct?

A Yes, sir.

MR. MEISELMAN: I offer it in evidence, your Honor.

MR. RITCHIE: Your Honor, I object on the grounds no proper foundation has been laid. It's pure rank hearsay as it presently stands.

THE COURT: Do you recognize that proposal?

THE WITNESS: Yes.

THE COURT: Is it a form of your firm?

THE WITNESS: Yes, sir. Yes, your Honor.

THE COURT: Is it one that your firm has people fill out or what?

THE WITNESS: We -- It's -- It's amongst -- I -- I believe, yes, it is. What I mean is, it's not the only one we would use, but it's one we use. It's one of -- of some --

THE COURT: Are you familiar with that particular one?

THE WITNESS: Not any more than I am, sir, with any other paperwork in the company. I'm familiar with my own letterhead, and I am familiar with its -- I'm familiar with it. I've seen it many times.

THE COURT: And used within your company?

THE WITNESS: Yes, sir.

THE COURT: Are you able to recognize the signature of the person who signed it on behalf of Merkel?

THE WITNESS: Yes, I am.

THE COURT: It will be received.

MR. RITCHIE: May I see it first? It's never been shown to me.

THE COURT: Surely. I thought you had had a chance to see it.

MR. RITCHIE: No, sir.

THE COURT: I'm sorry, Mr. Ritchie.

THE WITNESS: I believe that if I can -- Can I speak without -- Can I speak?

THE COURT: No, you had better not. Lawyers much prefer you just answer questions.

THE WITNESS: Yes, sir.

THE COURT: Rather than volunteer.

MR. RITCHIE: My only objection, your Honor, would be on the grounds of relevance. I don't see how it has anything to do with the issues in this case.

THE CLERK: Received, your Honor?

THE COURT: Yes, it will be received.

THE CLERK: Defendant McNamara's Exhibit C in evidence.

(So marked.)

BY MR. MEISELMAN:

Q Now, Mr. Little, I believe you said before that you have your file with you?

A Yes.

Q When you are as an electrical contractor called in to do work on a job, do you have records -- Withdrawn.

To coordinate with other trades, who calls upon you to do work on certain dates, on any particular job?

A Sir, if I can clear something, I'm not the contractor. I'm a representative of the contractor. I'm not

in any way -- I work for Merkel Electric. You understand? I am not their contractor.

Q Well, Merkel Electric was a contractor?

A They presently, and I am -- I serve as a superintendent for them.

Q Fine. We know that now.

As a superintendent for Merkel, when Merkel undertakes to do a job, it has to coordinate with other trades; doesn't it?

A Yes. That's my job.

Q Fine. To coordinate with other trades, somebody has to keep you advised, or you have to find out when you can come in to complete; is that correct?

A Sure.

Q Do you have any papers, documents, in your file which would show advices from the contractor to come in and work, or when you did work?

A I only have in this folder a record of every day that one of my men were on the job; but I don't have any record of anybody telling me when I should start or anything.

Q Do you have any records of any delays?

THE COURT: He said he has a record showing the days on which he had men on the job.

MR. MEISELMAN: Yes, I know that, sir.

Q Do you have any record of when you wanted your men on the job, but for some reason or other they couldn't go, whatever the reason may be?

MR. RITCHIE: Your Honor, I am going to object on the grounds of form, number one; and also on grounds of relevancy.

THE COURT: Well, I think that for one purpose it is relevant, at least in terms of a contention we know Mr. Meiselman plans to urge. From another point of view, it is quite irrelevant.

I am afraid I have to permit the answer at this stage.

Q Sir?

A The answer is, I would have to answer no.

Q And your file shows no delays?

A No.

Q On work on this job?

A No.

Q It proceeded in its regular course; is that correct?

A No. There was -- There was a time when the job -- I don't have the records showing when, but there was a time when during that job that I distinctly remember the job was held up, and we were forced to remove our men from the job.

I remember that, but I have no records right here of that.

Q Does your memory serve you as to why you were forced to remove your men from the job?

A Yes. The --

MR. RITCHIE: Your Honor, on the grounds of relevance, number one; on the grounds of form. It calls for a conclusion.

MR. MEISELMAN: I think this is of vital importance, your Honor.

THE COURT: Overrruled.

A (continuing) Should I answer the question?

Q Please.

THE COURT: Yes.

A The -- During the job there was some question, not due with the electrical work, but to do -- something to do with construction, which I have no idea what it was right now, but the town -- I believe it was -- The town of Brookhaven put signs on the job that the job was -- there would be no work permitted on the job whatsoever, and when -- Of course I had to adhere to that, and remove my men at that time, while those -- while those signs were on the building.

MR. MEISELMAN: Thank you very much.

No further questions.

MS. SELTZER: I have just one question, your Honor.

CROSS EXAMINATION

BY MS. SELTZER:

Q Do you recall what the sign said?

MR. RITCHIE: Objection, your Honor.

THE COURT: What is that? I did not hear your question, Ms. Seltzer.

MS. SELTZER: Does Mr. Little recall what those signs that were posted by the town of Brookhaven said?

MR. RITCHIE: Objection, your Honor.

THE COURT: No. That is quite enough. We know what Mr. Merkel -- Sorry, I did not mean to give you the whole company, Mr. Little.

Mr. Little's recollection is that the only holdup they had was because of a stop notice by the town. That is enough.

MR. MEISELMAN: Your Honor, I said I had no further questions, and I spoke too hurriedly.

THE COURT: I should have picked you up right away.

MR. MEISELMAN: May I have this marked?

THE COURT: I am not sure Ms. Seltzer is --

MS. SELTZER: Mr. Meiselman can handle it.

MR. MEISELMAN: May I have this marked?

THE CLERK: Document marked for identification

as Defendant McNamara's Exhibit D.

**** (So marked.)

CROSS EXAMINATION

BY MR. MEISELMAN: (continued)

Q Now, sir, I show you Defendant McNamara's Exhibit D. I ask you, sir, if you have ever seen it before?

A I couldn't answer yes. I seem to remember signs with red, for some reason. I don't know. Maybe just a --

Q Forgetting the color, are the words that you remember that --

MR. RITCHIE: Objection, your Honor. He's stated that he's not familiar with that Exhibit.

THE COURT: Let's see what the question is, Mr. Ritchie. Maybe it is one you will insist he ask and get answered. Please.

Q Can you recall, sir, the sign that you referred to? Can you tell me whether the Exhibit for identification, D, is the one you recall having seen?

A The sign I recall having seen said that the -- this structure, this structure was under violation, but I don't remember the full wording of this sign, no.

MR. MEISELMAN: Thank you, sir. No further questions.

MR. LEONE: No questions, your Honor.

MS. SELTZER: No questions.

MR. RITCHIE: The Government has no questions, your Honor.

THE COURT: You may step down, Mr. Little.

MR. RITCHIE: Does your Honor wish to continue? Does your Honor wish to continue?

THE COURT: We might run into a little trouble if I did.

All right. We will stop now, Members of the Jury, until 10:00 o'clock tomorrow morning.

Please do not discuss the case with one another, or anyone not on the jury until it is given to you to decide.

Good night.

Oh, tomorrow morning you report in downstairs at a quarter of 10:00, and then come up here. Come by the corridor door.

(The following occurred in the absence of the jury.)

THE COURT: If you will wait just a moment, Gentlemen.

MR. LEONE: Yes, your Honor.

HS fls

(continued on next page.)

HS:GA
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THE COURT: If you have no need -- if I may call them that -- the interstate commerce Exhibits thus far marked, I would like to have them so I can get the data on them for the dates and so on.

Will you need them tonight, or any of your gentlemen be needing them tonight?

MR. RITCHIE: Can can forego them tonight.

MR. MEISELMAN: I won't need them, your Honor.

THE COURT: Very well.

Is that the whole bunch of them?

THE CLERK: I will check, 1 through 10, your Honor.

THE COURT: The point, I think, is that Mr. Meiselman wants to continue to emphasize the argument that he made, and the proposition that we discussed at the beginning, that there wasn't any commerce around, so-to-speak, so that the dates are important, places of shipment are important --

MR. MEISELMAN: And to whom shipped.

THE COURT: -- rest times, et cetera. That's why I suggest to you that possibly it is in everyone's interest that we get all of this material in evidence, rather than have it out of evidence, otherwise, neither the Government's argument, nor the argument of the defendants can be adequately presented, nor can a ruling be made

with confidence.

The chances that Mr. Ritchie wouldn't be able to prove interstate commerce is so slight we must not stop on Section 1722, because that's just a question of transporting more witnesses in to prove what we all know is so. That's just a waste of everyone's time, and everyone's money. That accomplishes nothing.

If any of these documents are false, fabricated, or unreal, then, of course, everybody will be so happy on the defendants' side, but those things do not happen. I have spent twenty-seven years defending cases, and hoping that somebody would introduce a fraudulent Exhibit against me, and I'd be able to whip out the darned thing, but usually it is wrongfully introduced, but perfectly honest -- what do you do about it?

Another thing is, -- This is a rather special problem that I'd rather discuss with counsel, because it relates to a matter respecting counsel, and a feeling of sensitivity to my brother lawyers. I'd much rather discuss it simply with them and give them the freedom, and insist that they discuss it with you a little later, all right?

Is that satisfactory to you gentlemen, because if you do not like it, say so. This is the time to say so.

(Defendants leave courtroom.)

MR. MEISELMAN: There is a witness waiting, Mr. Sifarelli. I would have wanted him to produce his files. He is already under subpoena.

THE COURT: The subpoena by the United States for the trial, or the Grand Jury -- I take it that he made complete compliance? The subpoena was probably returnable to the United States Attorney, if it was a Grand Jury subpoena, and the witness was asked to produce the things that the Government wanted. He then gave his testimony, the Exhibits were retained --

MR. RITCHIE: It was a trial subpoena.

THE COURT: Was he the witness the last time, or was someone else?

MR. RITCHIE: He was, that is why I made out the subpoena to him.

THE COURT: So there is not any default.

If you want to call him, you are free to do so, but I do not think you can or should produce upon the jury the impression that the witness was in default, or was doing something wrong, because it is not so.

MR. MEISELMAN: That was not my intention.

THE COURT: I take it what you have in mind is getting into this other business, alleged deficiencies --

MR. MEISELMAN: With this witness, it is a differ-

ent aspect. The delay was caused by the lack of credit, and not by Thomas McNamara. Thomas McNamara accelerated it. The reason, if any, the shipment was delayed was because of the lack of credit, in addition to the fact it wasn't HarMac --

THE COURT: That is the LenAl business, as you know, was covered amply in the evidence. We will get to that. I suppose that helps a little. I do not think it does have any real relationship here. If you want to try and put it in as part of your case, you are entitled to a subpoena, of course.

The other thing that Mr. Ritchie -- Ms. Seltzer, Mr.Ritchie is still mad at your making a statement to the jury that your man was innocent, because he was so poor that he couldn't afford a lawyer, therefore, must be innocent. That was done by mentioning Legal Aid.

MR. RITCHIE: Very much so.

THE COURT: You have seen his whole wig flap when you did that. Do not do that sort of thing again.

Mr. Ritchie could put Mr. Morella on the stand, and hear with him, and in the presence of the jury, the doubts he undoubtedly has about the verity of the Affidavit which Mr. Morella supplied you.

MS. SELTZER: I am sorry, I did not realize that he was going to get that mad. It certainly was not

intended.

THE COURT: Now, Alternate Juror No. 1, in a rather agitated way, said she's in a terrible position -- She didn't want to cause any upset -- Tell me if I am getting this exactly right -- She found counsel's conduct was causing her flutters in her heart, and she was really substantially disturbed about whether she would be able to continue in the case if that was going to be something which went on throughout the case.

I did not want to continue it with her in the presence of the jurors who were not too far away. I silenced her as quickly as I could, and said the matter would be taken up. My guess is that she found Mr. Gillen's style upsetting.

MR. GILLEN: We are going to be three or four days with Mr. Goberman again.

THE COURT: That is my question to you, gentlemen, what do we do? She's Alternative No. 1, and we cannot very well give her a medical -- I do not think we have any standing to. It is a little odd.

MR. MEISELMAN: May I sit down?

THE COURT: Yes. Why don't you pull a chair over.

I do not know quite what to do.

MR. FISCHETTI: We have to let her go.

MR. RITCHIE: I would oppose letting her go.

THE COURT: I know. I asked you to come to this with a constructive attitude, if you will.

MR. RITCHIE: And I am. I do not believe shouting has any place in a courtroom, and if it offends a juror, I say that juror is properly offended. I mean no disrespect to the Court. I mean to take a constructive attitude, but I do not think it is appropriate, and I do not think the inappropriateness should excuse a juror who is picked after a lengthy jury selection process.

MR. GILLEN: If Mr. Ritchie guarantees that his main Government witness will answer questions --

MR. LEONE: Do not go into that.

MR. FISCHETTI: I don't think that was the point.

I have worked with Mr. Gillen before. Your Honor has seen him work. He has never had a problem. Some lawyers' styles are different than others. If that type --

THE COURT: What Mr. Ritchie is saying that there are styles and styles, but there really isn't any place for using a volume of sound that is intended to be a weapon of interrogation, and a means of extorting answers or of cowing belief into jurors, or daring them to disbelieve, or daring them to believe. I think that's

Mr. Ritchie's point, and I think it raises a real problem, and he is right when he says in some courts to examine and to sum up and open in the manner Mr. Gillen does, would be regarded as an impropriety, and would be stopped. -- No question about that.

As far as I know, it has never been done in this court.

Now, what Mr. Ritchie says is: "All right, this is the time when we have to decide that the rightness or wrongness of that." This is a chosen juror whom we all had to be sure a limited opportunity to challenge, as it happened, but the question is proposed in real terms, so let's sleep on it, decide what we are going to do.

MS. SELTZER: I think one of the reasons that we did pick four Alternates, if there was a problem such as this, we'd be adequately prepared to face it.

In view of the fact that there are three more after this woman --

THE COURT: That makes the whole question. If you put it this way, the probability of the use of an Alternate Juror is inverse to the Juror's number. The lower the Juror's number, the more likelihood the Alternate is to be called upon.

MR. MEISELMAN: If we are going to have a decibel

count because it offends a certain Juror, then one of the tools of cross-examination may be taken away. I think that it is proper to use a loud voice to a witness who's evasive. I think Mr. Gillen uses volume for emphasis, and not simply to cow a witness otherwise unwilling to be truthful in telling the truth.

THE COURT: Is that about it, Mr. Ritchie?

MR. RITCHIE: Your Honor, I do not know why Mr. Gillen uses his tone of voice. I am not going to judge his style, but I do say that that Juror has a right to her feelings, and we must all -- as counsel and as adversaries --

BS fls

(continued on next page.)

BS:GA
T8 PM

THE COURT: The one thing I am worried about is this, if it were a matter of taste, I am perfectly willing to tell you gentlemen about it, because I couldn't privately warn Mr. Gillen that his style did not please a juror, and if he wanted to get that juror on his side, he is going to have to change it; I couldn't do that. But here, what the juror has said, and it goes a little farther, don't you think so? She seemed -- I don't know whether it raises the question as to the complete stability of the juror --

MR. GILLEN: That could be, too, your Honor.

THE COURT: The one thing that we have to be concerned about is whether we have a stable or unstable juror on our hands. We can't tell whether it was that, or whether it was a genuine concern. I don't remember whether she said she had ever had jury service before, but I don't think she did. I don't know whether you gentlemen kept your notes, but I don't think she had had earlier jury service.

MR. GILLEN: Frankly, your Honor, I tried some 200 cases, and jurors enjoy summations.

THE COURT: She was talking in terms of a feeling that, although she has never fainted in her life, she couldn't control her heart action.

MR. FISCHETTI: That becomes more than offending

someone, that is a physical problem.

MR. RITCHIE: I would ask that there be further exploration of this --

THE COURT: I don't want to do it except with you gentlemen.

MR. GILLEN: If the juror has taken a dislike to me, and apparently that's what it is, I can't fault her for that, I think she should be excused.

THE COURT: I don't think it is a question of dislike. She certainly disliked the consequence to her, which, of course, is connnected, I think, with you. I certainly didn't ask her squarely to identify you.

MR. GILLEN: I don't think there is too much identifying who the culprit is.

THE LAW CLERK: I believe she said that if this continued, she might have to be carried out at the end of the trial.

MR. FISCHETTI: In view of the fact that it is an Alternate on the first day of trial, to run that type of risk in this case --

MR. RITCHIE: Realizing that it is on a medical ground, reluctantly, and only out of concern for this woman's health, and not out of a concern that justice be done --

THE COURT: That is really the only reason I raised

it with you in these terms, gentlemen. I don't want to do it if any one of us feels that we ought to have her in and ask her about it in more detail.

I have an uneasy feeling, I don't like, unless we absolutely have to, to get any one juror in to ask questions, because it seems to create an ambiguity around the case which doesn't otherwise exist.

See if you still feel the same way in the morning, gentlemen.

(Whereupon, the trial was continued to October 9, 1974, at 10:00 A.M.)

* * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against- : 73-CR-442

JOHN DE LISO, THOMAS MC NAMARA, ALPHONSE MEROLLA, and ALPHONSE M. MEROLLA, :

Defendants. :

----------x

United States Courthouse
Brooklyn, New York

October 9, 1974
10:15 o'clock A.M.

B e f o r e :

HONORABLE JOHN F. DOOLING, JR., U.S.D.J.

HENRY SHAPIRO
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: DAVID RITCHIE, ESQ.
-and-
MARSHA KATZ, ESQ.
Special Attorneys, Task Force

RONALD FISCHETTI, ESQ.
Attorney for Defendant De Liso

LEONARD J. MEISELMAN, ESQ.
-and-
MICHAEL GILLEN, ESQ.
Attorneys for Defendant Thomas McNamara

MS. MARION SELTZER
LEGAL AID SOCIETY
Attorney for Defendant A.M. Merolla

JOHN LEONE, ESQ.
Attorney for Defendant A. Merolla

Also present:

RICHARD MC MULLEN
Special Agent, Federal Bureau of Investigation

THE COURT: Do we know whether all the jurors are now here?

THE LAW CLERK: I will check, your Honor.

(Pause.)

THE LAW CLERK: Yes, they are all here.

THE COURT: Yes, gentlemen?

MR. RITCHIE: Am I correct in understanding that each of the defendants is moving for the excuse of alternate juror number 1?

MR. MEISELMAN: I cannot hear.

MR. RITCHIE: Am I correct in understanding that each of the defendants is moving for the excuse of alternate juror number 1?

MR. MEISELMAN: I so do.

MS. SELTZER: Yes.

MR. GILLEN: I do.

MR. FISCHETTI: I join in it.

THE COURT: What did you say, Ms. Seltzer?

MS. SELTZER: Yes.

MR. RITCHIE: Concerned with the welfare of alternate juror 1, the Government would join in that motion also.

THE COURT: How are we going to handle it?

Ask them all to come in or just ask her to come in?

MR. FISCHETTI: I would suggest to ask her to come in and excuse her and then allow the others to come in so she is not excused in their presence.

THE COURT: It is Mrs. Krasner.

MS. SELTZER: When you tell the jury, would you tell them it was for her personal reasons and not that we were ganging up on her, so they do not think we will start getting at them?

MR. RITCHIE: I will leave it up to the Court.

THE COURT: I think what we want -- what we do not want is to have the jury wondering whether she was a participant in it or owned a Buick automobile that she bought from Mr. McNamara or something.

MR. RITCHIE: Yes, your Honor.

(Alternate juror number 1 present.)

THE COURT: Good morning, Mrs. Krasner.

In view of what we said to one another, I thought it would be a good idea to have you go down to the Central Jury Room and be selected for another jury.

ALTERNATE JUROR NUMBER 1: I think so too. I thank you.

THE COURT: You are excused --

ALTERNATE JUROR NUMBER 1: Thank you.

THE COURT: -- from your attendance on this jury.

(Juror leaves Courtroom.)

THE COURT: That would make Sam Gutler alternate juror number 1, Mary Lombardi alternate juror number 2 and Mr. Smith alternate juror number 3.

MR.RITCHIE: I have discussed with the defense counsel the 3500 material and they have agreed that if I supplied the remainder of the 3500 material I would not have to turn over the trial transcript.

THE COURT: You would not?

MR.RITCHIE: Turn over the prior testimony from the January trial.

I will turn over all the 3500 material in the possession of the Government as to Mr. Harold Goberman, except as to 1302 which I will turn over as soon as Agent McMullen gets here. He had a breakdown with his automobile. He has the original of the 302. When it gets here, it will be photostated and turned over. It is a very short notation that Mr. Harold Goberman identified pictures of Alphonse Merolla who he identified as "Fat Nicky".

Grand jury testimony dated October 11th, 1972, which is marked in the prior trial as 3500-1 --

THE CLERK: Now marked 3500-3.

MR. RITCHIE: Grand jury minutes dated December 20, 1972, witness Harold Goberman, as 3500-4.

THE CLERK: So marked.

THE COURT: Do you have the Len-Al exhibits?

MR. MEISELMAN: I do not know which one it was. I have three marked.

(Documents handed to Court.)

MR. RITCHIE: Grand jury minutes dated September 12, 1973, previously marked as Government's exhibit 3500-3 in the preceding under 73C1330 --

MR. FISCHETTI: Is that with respect to Harold Goberman?

MR. RITCHIE: Yes.

THE CLERK: Now marked 3500-5.

MR. RITCHIE: FBI report of interview of Harold Goberman on August 28, 1972, consisting of 5 pages, previously marked as Government's exhibit 3500-4 in the preceding 73C1330 --

THE CLERK: Now marked 3500-6.

MR. RITCHIE: A report of interview -- an FBI report of interview of Harold Goberman, interviewed on September 19th, 1972, consisting of 6 pages -- I'd like to note that it is more than one interview. The third page is dated 3/6/73, the fourth April 18th, 1973 and the fifth is dated August 22nd, 1973. That was previously marked as Government's exhibit 3500-5 in the preceding 73C1330.

THE CLERK: Now marked Government's exhibit

3500-7.

MR. RITCHIE: I would like to note that I stated that there will be a further 302 concerning the identification of Alphonse Merolla, Fat Nicky. I see it is the fifth page of Government's exhibit 3500-7.

THE COURT: So it has been supplied already?

MR. RITCHIE: Yes, your Honor.

THE COURT: Clear, gentlemen?

MR. GILLEN: May I inquire as to whether or not there has been any other reports of interview of Harold Goberman since the last trial -- any notes of interview with him concerning his testimony of the last trial?

MR. RITCHIE: I have asked Mr. McMullen if there were any other materials and he stated, no. He gave me a list of the reports of interview. I have checked them out and I have turned over all at this stage.

MR. FISCHETTI: Might I also join in that inquiry and ask whether there are notes or reports of interviews taken by Mr. Ritchie or Mr. Pollack, other than Mr. McMullen.

MR. MEISELMAN: I join in the application.

THE COURT: Of Mr. --

MR. FISCHETTI: By Mr. Ritchie or Mr. Pollack of Mr. Goberman.

MR. RITCHIE: The only notes that I have are my trial preparation notes as to the line of questioning.

THE COURT: The what?

MR. RITCHIE: The only notes I have in my possession, other than the ones I turned over, are my work product with respect to the preparation of Harold Goberman.

THE COURT: You mean your witness sheet?

MR. RITCHIE: Yes, your Honor.

MR. FISCHETTI: My inquiry was geared to questions and answers of Mr. Goberman by Mr.Ritchie which falls within the purview of 3500 material. If that is all he has --

MR.RITCHIE: That's all I have.

THE COURT: Satisfied?

MR. FISCHETTI: Yes.

MR. MEISELMAN: When the witness Cifarelli was excused yesterday, I spoke with him in the hall and I asked him if he would return with the subpoena and he told me he would, but he would ask Mr. Ritchie's permission first if he should.

May I ask Mr. Ritchie if he was asked for such permission, because the witness did not show up this morning.

MR. RITCHIE: He asked me if he was required and he asked me if I would consent. I said it was up to him to appear or not appear as he saw fit. I said I wasn't certain as to what your Honor said. He should be guided by his recollection of that.

THE COURT: Who is that, Mr. Cifarelli?

MR.RITCHIE: Yes.

THE COURT: I did not say that he should appear today.

MR. MEISELMAN: I asked him to appear and he said that he would if Mr. Ritchie would give his consent.

MR. RITCHIE: I stated that I had no opposition to his coming at all.

THE COURT: All right, are we all set gentlemen?

(Jury present.)

THE COURT: For personal reasons Mrs. Krasner had to be excused from the jury.

Mr. Gutler will you become alternate juror number 1, Miss Lombardi will you become alternate juror number 2 and Mr. Smith would you become alternate juror number 3. Thank you.

(Continued on next page.)

Notes

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1 Goberman - direct

MR. RITCHIE: The Government would call as its next witness Harold Goberman.

H A R O L D G O B E R M A N , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: State your full name, please.

THE WITNESS: Harold Goberman.

DIRECT EXAMINATION

BY MR. RITCHIE:

Q Mr. Goberman, during the course of your examination, would you please keep your voice up so that the last juror in the rear of this box and Mr. Gillen, the last man at defense counsel table, can hear you at all times.

A Yes, sir.

Q What is your age?

A 36.

Q When were you born?

A March 30, 1938.

Q Where were you born?

A Brooklyn, New York.

Q What is your educational background?

A Three years high school.

Q Mr. Goberman, have you ever been convicted of a Federal crime?

A Yes, I have.

Q On how many occasions?

A Two, sir.

Q When was the first of those two occasions?

A 1957.

Q What felony were you convicted?

A Grand larceny.

Q And that was a State offense?

A Yes, sir, it is.

Q And what was the second conviction that you received?

A 1964, theft of foreign commerce.

Q That is a Federal offense?

A Yes.

Q What was that in connection with?

A What do you mean, what it was in connection with?

Q What event led up to that?

A A hijacking.

Q Were you armed during the course of that hijacking?

A I was armed.

Q Now, during the course of your adult life, have you ever used a name other than Harold Goberman?

A Yes, I have.

Q What other name or names have you used?

A Frank Master, Harry Masters, Harry Masterson, Russell Lambert, Jack Slade, Harry Masterson and Harold Goberman.

Q In connection with any aspect of your life at the present time are you using any name other than Harold Goberman?

A Yes, Harry Masterson.

Q And that is in connection with what?

A Work.

Q Do you have any lisence at the present time?

A Yes, I do.

Q What type of license do you have?

A FAA license.

Q FAA license --

A Federal Communication license.

Q Is that a pilot's license?

A Yes, it is.

Q In connection with that pilot's license, what name do you use?

A Harry Masterson.

Q Do you use any name other than Harry Masterson in connection with your employment?

A Yes, Harry and Harold Goberman.

Q What are you doing for a living at the present

time?

A Construction.

Q During the course of the year 1971, by whom were you employed?

A Len-Al Contractors.

Q Is that spelled L-e-n - A-l?

A That's right.

Q Were any of your relatives associated with Len-Al Contracting Corp.?

A Yes.

Q Which of your relatives was so associated?

A My sister-in-law and my brother.

Q What are their names?

A Helen Goberman and Allen Goberman.

Q How is the name Len-Al formed?

A The last three letters of my brother's first name and the first two letters of his first name.

Q He sort of transposed Allen in Len-Al?

A Correct.

Q What was your position with Len-Al contracting?

A Estimator, superintendent and manager.

Q Were you ever at any time an officer of Len-Al Contracting?

A No, I was not.

Q In the course of your employment as an estimator, did you ever have occasion to fill out any estimates for Len-Al Cotnracting?

A Yes, I did.

Q And during the course of preparing such estimates, did you ever state that you were an officer of Len-Al Contracting?

A I think I did and I also probably signed on business bonds.

Q How are you paid by your brother?

A By a weekly salary.

Q And during the course of that year, 1971, did you ever have occasion to do any work on construction of a car showroom for Zeidler Motors, Z-e-i-d-l-e-r-?

Is that correct, Mr. Goberman?

A I think it's Z-i-d-l-e-r.

MR. RITCHIE: I think I am right.

Q What type of building was your company constructing?

A Automobile showroom, service facility.

Q During the course of your work on the construction of that building, did you ever have occasion to meet an individual named Thomas McNamara?

A Yes, I did.

Q Do you see that individual present in this Courtroom?

MR. GILLEN: Identification conceded, your Honor.

MR. RITCHIE: Would you please point him out?

THE WITNESS: The gentleman with his hand up.

Q Is that Thomas McNamara?

A Yes, it is.

Q Now, after meeting with Mr. Thomas McNamara, didyou ever become engaged in any business association with him?

A Yes, I did.

Q In what business association was that?

A For the construction of an automobile showroom and new car service facility.

Q If you recall, approximatey what month did you first meet him?

A I would say between July and September of 1971.

Q And did there come a time when you entered into a contract with Mr. Thomas McNamara?

A Yes, there was.

Q When you entered into that contract, was it in oral form or written form?

MR. MEISELMAN: Objection.

THE COURT: Overruled.

THE WITNESS: There was an oral contract first and then a written contract.

Q Can you describe the facility that was to be built?

A A new car showroom and a service facility.

Q Where was it to be built?

A On Route 347, Port Jefferson.

Q Is there any other name for that road?

A Nesconsett Highway.

Q When you entered into that contract, was there any mention of Len-Al Contracting Corp.?

A In what respect?

Q Was Len-Al listed as one of the parties to the contract?

A No, Len-Al was not.

Q At the time that you entered into a written contract, were you represented by an attorney?

A Yes, I was.

Q If you know, was Thomas McNamara represented by an attorney?

A Yes, he was.

THE CLERK: Marked for identification as Government's Exhibit 11.

(So marked.)

Q Now, I show you what has been marked as Government's Exhibit 11 for Identification and I ask you if you recognize that document?

A Yes, I do.

Q What is that document?

A It is the contract between myself and McNamara Re-New Cars, Inc.

Q Does your signature appear anywhere on that document?

A Yes, it does.

Q And does the signature of Thomas McNamara appear anywhere on that document?

A Yes, it does.

Q Did that contract make any provisions for assignment of your rights under that contract?

MR. MEISELMAN: Objection. The contract speaks for itself.

THE COURT: Overruled. It will take us a lot less time to find that quick this way.

THE WITNESS: Yes, it does.

Q Is that to any corporation that you were the sole shareholder in?

A Yes.

MR. RITCHIE: Your Honor, I would offer at this time Government's Exhibit 11 for Identification into evidence.

(Exhibit shown to counsel.)

MR. GILLEN: No objection, your Honor.

THE COURT: Received.

THE CLERK: Now Government's Exhibit 11 in Evidence.

BY MR. RITCHIE:

Q Subsequent to the -- can you just read the date of this contract was entered into this written form?

A February 24, says 1970.

Q Is that the date on the contract?

A Yes, it was entered into February 24, 1972.

Q Now, subsequent to the signing of that contract, did you thereafter form any corporate corporation?

A Yes, I did.

Q What was the name of the corporation?

A HarMac Contractors or Construction.

THE COURT: What was the rest of it?

THE WITNESS: HarMac Construction or Constractors

THE COURT: You can't remember which?

THE WITNESS: No, I cannot, your Honor.

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(Continued on next page.)

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DIRECT EXAMINATION

BY MR. RITCHIE: (Cont.)

THE CLERK: Marked for identification as Government Exhibit 12.

(So marked.)

Q I show you Government's Exhibit 12. Would this refresh your recollection as to the precise name?

A Yes.

QWhat is that name?

A HarMacContracting Corporation.

Q Subsequent to the formation of that contract, did you assign your rights under that contract to that corporation?

MR. MEISELMAN: Objection, and calls for a conclusion on the part of the witness.

THE COURT: Yes, let's hurry across this. Did you or didn't you?

THE WITNESS: Yes, I did, your Honor.

BY MR. RITCHIE:

Q Now, prior to the signing of this contract, did you do any work on that particular job site?

A Yes, I did.

Q What type of work had you done?

A Stripping the land.

Q Now, where did you get the equipment to strip the land?

A From Len-Al Contractors Corporation.

Q Now, subsequent -- during the course of the construction did you at any time purchase any equipment to be used in connection with the construction?

A Yes, I did.

Q What equipment did you purchase?

A Trailer, trowling machines.

Q Could you spell it?

A T-r-o-w-l-i-n-g.

Q When did you purchase this trailer?

A March or April of 1972 --

Q Is there anything that would refresh your recollection as to the precise date that you signed -- that you purchased the trailer?

A Yes, the bill of sale.

THE CLERK: Marked for identification as Government's Exhibit 13.

(So marked.)

MR. GILLEN: 13?

THE CLERK: Yes, sir.

THE COURT: What happened to 12?

MR. GILLEN: That was for identification, your

Honor.

MR. RITCHIE: We just had it.

BY MR. RITCHIE:

Q I show you what has been marked Government's Exhibit 13 for identification. I ask you if that refreshes your recollection as to the date you purchased that trailer?

A Yes, it does.

Q What was that date?

A March 15, 1972.

Q Now, do you recognize that document?

A YEs, I do.

Q What is it?

A It's a bill of sale, one used metal construction trailer. Eight by twelve, two years old,in good condition from the MM Construction Corporation.

Q Who prepared this bill of sale?

A I am not sure as to who prepared it.

Q Is there typing and written portion of that bill of sale?

A Yes, there is.

Q Who prepared the typed portion of that bill of sale, if you know?

A I assume it was MM Construction.

MR. GILLEN: Objection to the supposition.

THE COURT: Do you know?

THE WITNESS: I do not remember.

BY MR. RITCHIE:

Q Is there any writing that does appear on that document?

A Yes.

Q What is that -writing?

A HarMac Contracting Corporation.

Q Is there handwriting on that document which is not in your hand?

A Yes, there is.

Q What portion -- what handwriting is not in your hand without reading it, just tell us what writing.

A The signature of the person that I bought the trailer from.

Q Whose hand is that in, if you know?

A Benjamin Saccocio.

Q Did you pay any money for this trailer?

A Yes, I did.

Q How much money did you spend for the trailer?

A $1,500.

Q Did you pay by cash or by some other form of payment?

A I paid by check.

THE CLERK: Marked for identification, as Government Exhibit 14.

(So marked.)

BY MR. RITCHIE:

Q Now, I show you what has been marked as Government's Exhibit 14 for identification.

I ask you if you recognize it?

A Yes, I do.

Q What is it?

A A check payable to MM Construction Corporation for $1500 for payment of the trailer.

Q Is that check drawn on your account?

A Yes, it is.

Q And --

THE COURT: Harold Goberman account?

THE WITNESS: No, HarMac Construction account.

Q Is that check --

MR. RITCHIE: Your Honor, I would offer into evidence Government's 13 and 14.

(Documents shown to counsel.)

THE COURT: What's the date of it, too?

MR. RITCHIE: March 15, 1972.

(Pause.)

MR. GILLEN: May I have a short voir dire on the purported Exhibit 13 -- the purported bill of sale.

I would like a short voir dire.

MR. GILLEN: Yes, it won't be any cross.

VOIR DIRE EXAMINATION

BY MR. GILLEN:

Q Mr. Goberman, I show you the 13 for identification -- what you described as a bill of sale -- can you tell me, please, that HarMac Construction Corporation is printed and written in there; is that correct?

A It's in printing that I wrote.

Q You wrote that yourself?

A Correct.

Q When did you write that in?

A When he gave me the bill of sale I wanted it made out to the company.

Q What company?

A HarMac Contracting Corporation from which I gave him the check.

Q You wrote that in on March 15, 1971; is that what you are telling us?

A Yes, I did.

Q When was HarMac formed, do you know?

A I could not know the exact date.

7 Goberman - voir dire/Gillen

Q What's your best recollection?

A I would assume around March '72.

Q What part in March?

A I do not know.

Q Was it before or after you wrote in the name HarMac Construction Corporation?

A I do not know.

Q What's your best recollection?

A Sir, I said I do not know.

Q What is your best recollection? Was the name written in before or after March 15 -- withdrawn.

Was HarMac Corporation formed before or after March 15 -- your best recollection.

MR. RITCHIE: Objection, your Honor, asked and answered.

THE COURT: He said that he had no recollection on the point.

Q Is there anything in the Courtroom that could refresh your recollection?

A Not to my knowledge, sir.

Q Where is the certificate of incorporation of HarMac?

A I assume with my attorney, who formed it.

Q When you assume -- respectfully ask where it is

== do you know where the certificate of incorporation is?

Did you give it to the attorney?

A He prepared it.

Q Did he keep it?

A I assume that he did.

Q Did he give it to you?

A No, he did not.

Q So you have never seen it, is that what you are telling us?

A I think on one occasion about a year ago, I called him as to the date of it and he told me at that time and I did not take the certificate from him.

Q Did you make a note of that?

A What do you mean, did I make a note?

Q When was it that you called the attorney and asked him about the --

MR. RITCHIE: I would object.

We are beyond the scope --

THE COURT: Please let's establish the date some other way.

(Continued next page.)

BS flws.

VOIR DIRE EXAMINATION

BY MR. GILLEN: (Cont'd.)

MR. GILLEN: Fine, if Mr. Ritchie has it, your Honor, but I don't have it.

MR. RITCHIE: I don't know anything I can establish it from, that I have presently.

THE COURT: What is that?

MR. RITCHIE: I don't know anything that I can establish it from that I have presently.

THE COURT: If you have had it then inform the jury of it.

MR. RITCHIE: Yes, your Honor.

MR. GILLEN: I have nothing further. I would object to Exhibit 13 and to Exhibit 14.

THE COURT: Overruled.

THE CLERK: Now Government's Exhibits 13 and 14 in evidence.

(So marked)

DIRECT EXAMINATION

BY MR. RITCHIE: (Cont'd.)

Q At the time you purchased the construction trailer on March 15th, did you have funds in your bank to pay for the construction trailer?

A Yes, I did.

Q Where had you gotten those funds from?

A Mr. McNamara.

Q Was this a gift or what was it? How did you get $1,500 from Mr. McNamara?

A An advance on the job until the requisitions went through.

Q With respect to Government's 14 in evidence, that is a check drawn on your account, isn't it?

A That's correct.

Q Was that the type of check that you normally used in connection with your account?

A This was the check that I got in the beginning when I opened the account until the printed check came through.

Q Did there subsequently come a time when the printed checks came through?

A Yes, there was.

Q Did they appear on their face to be the same as those checks -- that check that you have in front of you?

A No.

Q I show you what has been marked already as Government's 12 for identification and I ask you if you recognize this document?

A Yes, I do.

Q What is it?

A The printed chedks that came through subsequent to the other check.

Q After you received the printed checks, did you use the printed checks in the regular course of your business?

A Yes, I did.

Q Did you stop using the original checks that had been issued you?

MR. MEISELMAN: I object as leading, your Honor.

A Yes, I did.

THE COURT: It doesn't matter on these points.

MR. RITCHIE: Your Honor, I would offer into evidence Government's 12 into evidence.

MR. GILLEN: I am going to object. I don't know what the purpose of the check is. It is made out to a Kenneth Hooker and signed --

THE COURT: Is it in any significant amount?

MR. GILLEN: $82 --

THE COURT: Is it something that is going to come up on the --

MR. GILLEN: I don't know what it is. Unless he's showing it for the check and if that is the case, I have no objection.

THE COURT: I understand that is all.

MR. RITCHIE: That is the only purpose I'm offering it for.

THE COURT: So the payee and amount are utterly besides the point?

MR. RITCHIE: Yes, your Honor, so far as I am concerned.

THE CLERK: Now Government's Exhibit 12 in evidence.

(So marked.)

BY MR. RITCHIE:

Q Now, you stated that you borrowed $1,500 from Mr. McNamara. Did you at tany time --

THE COURT: He didn't say that. He said it was an advance on construction.

MR. RITCHIS: Sorry.

Q You stated that you were advanced $1,500? Were you at any other time advanced any other sums of money by Mr. McNamara?

A Yes, I was.

Q And how much additional monies were you advanced?

A There was a total, including the 1,500, of $13,700.

Q When if ever did you repay that money?

A Approximately May, 1972.

Q Now, during the course -- how long were you engaged in the construction of McNamara Buick-Pontiac job?

THE COURT: When you say -- you -- I take it you mean through Harmac Construction Corp.

MR. RITCHIE: Yes, your Honor, I am sorry.

Q How long was Harmac Contracting Corp. engaged in the construction of the McNamara Buick-Pontiac job?

A Up until June 28, 1972.

Q That was from February, is that correct?

A That's correct.

MR. MEISELMAN: May I get that answer.

THE COURT: He said June 28, 1972, that was the period that Harmac was on the job, from February. Is that right?

THE WITNESS: That's correct, your Honor.

Q During the course of this construction, did you individually handle the ordering of any materials to be used in the construction?

A Yes, I did.

Q And what if any goods were installed on that job, that you recall?

A What do you specifically mean, what if any

goods?

Q Were any of the goods that you ordered, ordered from out of state?

A Yes, there were.

Q Do you recall any of the goods that were so delivered?

A Yes.

Q Can you relate them for the Court and jury?

A The bar joist --

MR. MEISELMAN: Your Honor --

THE COURT: May I interrupt? May we have dates, sir?

THE COURT: Let's get the things first and then see if he can date them, because it may be that we will have to look at the record for something. The --

THE WITNESS: The bar joist --

THE COURT: What is that word?

THE WITNESS: Bar joists. From Guille Product Norfolk, Virginia.

Q That is j-o-i-s-t-s, is that correct?

A That's correct. The steel decking for the roof from Roleform Products.

Q Where are they located, or where were the

goods shipped from?

A The manufacturer is actually in Pittsburgh, Pennsylvania. I think they were shipped somewhere out of Boston.

THE COURT: They were shipped from Boston --

THE WITNESS: Somewhere in the New England States. The light bulbs from GE.

THE COURT: The light --

THE WITNESS: Poles and fixtures from General Electric Corp. The bifold exterior aluminum doors from Alumline, Pawtucket, Rhode Island, and the asphalt materials independently came from someplace in New Jersey.

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DIRECT EXAMINATION

BY MR. RITCHIE: (Cont.)

Q With respect to the bar joists, do you recall the exact date that you received them?

A No, I do not.

Q Were they, in any event, installed on the job site at the time that you quit working on the job?

A They were already installed.

Q With respect to the metal decking, do you recall the exact date that you received those goods?

A No, I do not.

Q At any event, do you know whether they were installed on the job site -- into the building, I should say, at the time that you -- on June 28, 1972?

A Yes.

THE COURT: On or before.

MR. RITCHIE: Were they installed on or before June 28, 1972?

THE WITNESS: Yes, they were.

BY MR. RITCHIE:

Q With respect to the exterior lighting, do you know whether those poles were installed on the job site by June 28, 1972?

A No, they were not installed.

Q With respect to the aluminum products that you told us about, were they installed on the job site on or before June 28 --

THE COURT: WHat was the second word, aluminum --

MR. RITCHIE: Products, your Honor, that he told us about.

Q What were they again?

A Aluminum bi-fold doors.

Q What is a bi-fold door?

A It could be two sections or more that come together.

Q It serves as a door; is that correct?

A When it's folded out it becomes one door.

Q Were those bi-fold doors installed on the job by June 28, 1972?

A No, they weren't.

Q With respect to the asphalt that you had ordered, was that installed on the job by June 28, 1972?

A No,it was not.

Q And from whom was this asphalt ordered.

A Rayson Asphalt.

Q Were those all the goods that were ordered from out of State, if you know?

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A The only other products were the windows.

THE COURT: What was that?

THE WITNESS: The only other product was windows.

Q And do you recall who you ordered them from?

A The manufacturer is someplace in either North or South Carolina. They were ordered through Koter Products, Rocky Point.

Q With respect to the bar joists and metal decking, did youorder them directly from Roleform and from --

A I ordered them through Fireproof Products.

Q Did you order both items, the joists and the decking yourself?

A Yes, I did.

MR. MEISELMAN: Your Honor, when he says "yourself" does that refer to Mr. Goberman personally or in behalf of HarMac?

Q Did you, yourself, as an individual order them?

THE COURT: Use your own voice?

THE WITNESS: I ordered it through the corporation. I personally ordered it through --

THE COURT: You were the officer or employee of the corporation who placed the phone call, wrote the letter or whatever conatituted the order?

THE WITNESS: Yes. I placed the phone call and signed the written purchase order.

MR. MEISELMAN: For HarMac, your Honor?

I want to get the corporation.

MR. RITCHIE: Your Honor, this is for cross-examination.

MR. MEISELMAN: I'm going to object --

THE COURT: He wants clarification.

BY MR. RITCHIE:

Q With respect to both of those items, do you know whether you ordered it through the corporate identity HarMac?

A Yes.

Q This is with respect to both items?

A Yes.

Q You are certain of that?

A Yes, I am.

Q Do you remember when you ordered both of those items?

A No, I do not.

Q Are you certain that it was after the formation of Harmac Contractors?

A Yes, I am certain.

Q During the course of this construction, did

youever have occasion to speak with Mr. Thomas McNamara?

A Yes, I did.

Q And can you approximate on how frequent a basis you would see Mr. Thomas McNamara?

A Almost every day.

Q Did Mr. McNamara indicate dissatisfaction with the way you were constructing the building?

MR. MEISELMAN: I object to the form of the question. It's leading.

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THE COURT: It is leading and after the answer to this question you must stop leading. It ceasing to be helpful and it is damaging at this point.

This one you may answer. Your answer is?

THE WITNESS: Yes.

Q Please repeat the question.

(Question read.)

THE WITNESS: Yes, he did.

Q Now, did you have any employees on this job?

A Yes, I did.

Q And who was your highest employee?

MR. MEISELMAN: At what date, your Honor, approximately, if we may. It becomes important.

Q Who was your highest employee at any time?

A The superintendent on the job.

Q What was his name?

THE COURT: Who?

THE WITNESS: The superintendent on the job.

Q What was his name?

A Gary Trabbi.

Q Approximately when did he commence working upon the job?

A May, 1972.

THE COURT: Would you spell that last name for

the court reporter, please?

Q Can you spell that last name?

A T-r-a-b-b-i, to the best of my knowledge.

Q Could it possibly be Taibbi?

A That is the correct spelling. I said to the best of my knowledge.

Q How did you come to hire this individual Taibbi?

A Through a resume that he sent to LenAl.

Q Directing your attention to June 5, 1972, did you have occasion on that date to speak with Mr. Taibbi?

A Yes, I did.

Q Was it in person or by some other form of communication?

A By phone.

Q As a result of the conversation with Mr. Taibbi, what if anything did he then do?

A Mr. Trabbi called me approximately 8:30 in the morning and said that he had --

MR. FISCHETTI: Objection.

MR. MEISELMAN: Objection.

THE COURT: What Mr. Taibbi said to Mr. Goberman is not any evidence of the facts, because obviously the witness before you is not Mr. Taibbi, but Mr. Goberman, who knows only what Mr. Taibbi said to him.

So you may hear this answer but solely and only for the purpose of understanding why Mr. Goberman next took the action that he did.

MR. RITCHIE: Your Honor, I will withdraw the question and I will rephrase it.

Q After you had this conversation with Mr. Taibbi, what if anything did you do as a result of having had that conversation?

A I went out to the job site in Fort Jefferson.

Q What if anything did you do when you arrived at the job site?

A I pulled up a couple of hundred feet behind the construction trailer, walked over to Mr. Trabbi. He said, "The hoods are inside..." --

MR. MEISELMAN: Objection.

MR. FISCHETTI: Objection to what he said.

THE COURT: You were asked what did you do.

A I walked over to Mr. Trabbi.

Q Did you have a conversation with Mr. Taibbi?

A Yes, I did.

Q As a result of that conversation what if anything did you then do?

A I went into the trailer.

Q When you went into the trailer, was there anyone

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else present in the trailer?

A Yes, there was.

Q And how many individuals were present in that trailer, was there one or more than one person?

A Tow individuals plus myself.

Q And if you know, what were the names of those two individuals?

A Mr. Alphonse Merolla and John De Liso.

Q Do you see the individual that you referred to as Alphonse Merolla present in this courtroom today?

A Yes I do.

Q And can you point him out by what he is wearing?

A Yes. Glasses, red tie, white shirt and sport jacket, grayish stripes in it.

Q And you point -- standing up, can you point to him, please?

A Yes.

THE COURT: Mr. Alphonse M. Merolla, who is the only one at counsel table who is wearing that combination of clothing -- agreed, counsel?

MR. RITCHIE: Mr. Fischetti is pretty close, your Honor, with a nice red tie.

THE COURT: I would not characterize his sober lawyer-like jacket as a sports jacket.

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MR. FISCHETTI: Thank you, sir.

Q Do you see the other individual present?

A Yes I do.

Q In this courtroom?

A Yes.

Q Can you describe what he is wearing?

A Blue jacket, dark tie, shirt with a design on it and a white collar.

MR. FISCHETTI: The identification of Mr. DeLiso is conceded, may it please the Court.

MR. RITCHIE: Let the record reveal that the witness has identified as Alphonse Merolla the defendant captioned Alphonse M. Merolla, and he has identified the defendant John DeLiso.

THE COURT: That is right.

Q At that time in that trailer, what if anything — withdrawn. What if any conversation did you have with these individuals at that time?

A I walked in. Merolla said, spoke to me and he said, "You got problems on this job. You better get them straightened out."

I says, "What do you mean by that?" He says, "You got problems. Get them straightened out. We're 25 percent owners and we're connected."

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I says, "What do you mean connected?" He says, "Well, we're Columbo." I says, "What do you mean by that?"

MS. SELTZER: Objection, your Honor.

THE COURT: Overruled.

A "What do you mean by that?"

THE COURT: Just a moment. I should explain to you, members of the jury, that you are not hearing this for the purpose of having any statement as to any other defendant, other than the defendant being accused as using these words by the witness, or for any other purpose than to show that he used that name, without further identification than that, for whatever purpose.

It does not establish as a fact in any way that there was any person named Colombo who was in any way connected with Mr. Merolla or with these matters.

MR. RITCHIE: Your Honor, may I have a side bar at this time?

THE COURT: Yes, you may.

(Side bar):

MR. RITCHIE: Your Honor, my first point would be that your instruction -- I have no disagreement with it at this time, but in the future when the Government establishes a conspiracy, if it does, I would ask that

the Court then instruct the jury that that statement may be considered against each and every defendant in this case as being part of the res gestae in conspiracy and in the course and furtherance of the conspiracy.

I would also at this time -- as I recall, your Honor, during the course of the last trial, allowed Government counsel to inquire into his understanding of who was meant by Colombo.

THE COURT: What he thought he meant.

MR. RITCHIE: Yes, your Honor. Will your Honor allow that at this time?

THE COURT: Yes, you may.

You were about to say?

MR. MEISELMAN: I will object at any time to the use of the word "Colombo," in the sense that it will be connected with Mr. McNamara, unless and until there is shown to be a connection between these parties and McNamara.

THE COURT: Of course, that's what he said.

MR. MEISELMAN: He wanted to show that it would be attributable to all.

THE COURT: When they are shown to have been conspirators, that's what he said.

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In other words, the name Colombo gets in it only exactly the same way that a pistol would get into it or something of that sort, because how many people are in this world named Colombo, and which of them are famous detectives and which of them are not.

MR. GILLEN: That's probably who it is.

MR. FISCHETTI: During the last trial, after lengthy argument, as I recall it, you allowed Mr. Pollack to inquire as to Mr. Goberman's state of mind when he said "Colombo."

You did not allow him to say who he thought he meant was Colombo. So the name Joseph Colombo and all that never came into this record.

I think that's what he wants to ask him.

MR. RITCHIE: I may be wrong, your Honor. I will ask the question as Mr. Fischetti has stated already.

MR. GILLEN: That was the record.

MR. RITCHIE: I was wrong then.

THE COURT: What is that?

MR. GILLEN: The name Joseph Colombo never came into the record. I think you permitted Mr. Pollack to ask him for the state of mind, which we of course object to.

MR. LEONE: At the last trial --

THE COURT: I take it if we believe Mr. Goberman, this is supposed to indicate that Alphonse Merolla tried to scare him by using the name, right?

MR. FISCHETTI: That was your Honor's ruling last time.

THE COURT: Then I suppose he curled up in terror.

MR. FISCHETTI: I have a record objection. I objected last time --

MR. LEONE: Your Honor, it is prejudicial to these defendants and inflammatory --

THE COURT: Yes, and I think I said the last time -- I have a terrible way of repeating myself, I am afraid -- I said the last time that that is exactly why he used the name, if the witness did believe it.

In other words, he was reaching for, according to the witness, for a terror-inspiring name so he picked this out of the nearest newspaper and used it.

(Open court):

BY MR. RITCHIE:

Q Can you relate the substance of the conversation that you had with those two individuals?

MR. MEISELMAN: I believe that was already testified to, your Honor.

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THE COURT: I think there was an interruption at that point.

MR. RITCHIE: Part of it had been related, your Honor, and there was an interruption.

THE COURT: Yes, as I say, you may continue.

A Well, I was told they were 25 percent owners --

MR. GILLEN: Objection.

MR. FISCHETTI: I must at this time ask him who told him that -- there were two people there.

THE COURT: There were two people there, as you say. Can you tell us who was the spokesman, if there was one; who talked?

THE WITNESS: Mr. Alphonse Merolla.

Q What if anything did Mr. Alphonse Merolla say and what if anything did you say and what if anything did John DeLiso say?

A That I had problems on the job --

Q Mr. Goberman, could you please describe the particular individual --

A Mr. Merolla said that I had problems on the job and I better get them straightened out. So I asked who they were, and he said they were connected. "What do you mean connected?" He says, "We're Colombo." Then he says, after that he says, "You better get hold of your Rabbi and

get it straightened out."

Q What if anything did you then do?

A I called Mr. Salvatore Spatarella to find out if they were who they said.

MR. MEISELMAN: Objection, your Honor.

THE COURT: You called somebody.

Q What particular individual did you call?

A Salvatore Spatarella.

Q After you made this call to Mr. Spatarella, what if anything occurred next?

A We made arrangements to meet later on in the morning at --

MR. MEISELMAN: I object.

Q Who is "we"?

MR. MEISELMAN: I withdraw the objection.

A Myself, Mr. Spatarella, Mr. Merolla and Mr. DeLiso made arrangements to meet at Chuckie's Charcoal Broil later on in the morning.

Q At this point in the trailer you were doing the speaking with Mr. Spatarella and not Mr. Merolla or Mr.DeLiso; is that correct?

A That's correct.

THE COURT: What was the name of that restaurant?

THE WITNESS: Chuckie's Charcoal Broil.

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Q You were speaking with him on the phone, is that correct?

A Is that correct.

Q Subsequent to the ending of that telephone conversation, what if anything occurred next?

A We went over to Chuckie's Charcoal Broil to await Mr. Spatarella to come out to the restaurant.

(Continued next page.)

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DIRECT EXAMINATION

BY MR. RITCHIE: (Cont.)

Q And --

THE COURT: When you say "we," who are "we"?

THE WITNESS: Mr. Merolla, Mr. DeLiso and myself.

Q What, if anything, occurred at Chuckie's Charcoal Broil Restaurant?

A At approximately 11 o'clock, Mr. Spatarella arrived.

Q Where did you meet Mr. Spatarella?

A Pardon me?

Q Where did you meet Mr. Spatarella?

A Outside, in the parking lot.

Q After meeting -- whowas present when you met with Mr. Spatarella, if anyone?

A Mr. Merolla and Mr. DeLiso.

Q Subsequent to meeting with Mr. Spatarella, what, if anything, did you then do?

A We all proceeded inside the restaurant.

Q What, if anything, occurred in that restaurant?

A We all sat down at a table, and they had said to me --

MR. MEISELMAN: Objection.

THE COURT: No. Here at this point we want to know who said what.

Q When you relate a conversation -- are you about to relate a conversation? Is that correct?

A That is correct.

Q When you relate this conversation, please ascribe to each individual what he himself said and make it clear on the record, please.

A Yes.

We all went inside and sat down at a table. Mr. Merolla reiterated to myself and Mr. Spatarella that they're 25 percent partners and I had problems on the job and that I'd better get them straightened out.

Then we started talking. I says "Well, the payments are behind." And he says, "I guarantee them."

Q Who said that?

A Mr. Merolla.

MR. MEISELMAN: If your Honor please, I would ask for an instruction by the Court that those words do not bind us.

THE COURT: At this stage of the case, members of the jury, what counsel's objection is intended to draw your attention to is that Mr. Thomas McNamara was not at this meeting. There was no evidence at all

that he knew it was taking place, sanctioned it in any way, directly or indirectly.

So that so far as you are concerned, this is material which is connected only with Mr. Alphonse M. Meroll a and Mr. John DeLiso, in the testimony of Mr. Goberman.

Whether it ever becomes something which is in any way the concern or business of any of the other defendants will depend on the totality of all the evidence, when it has all been presented to you.

BY MR. RITCHIE:

Q Now, what, if any, conversation occurred in Chuckie's Charcoal Broil after Mr. Merolla reiterated the fact that -- the facts you've already stated?

MS. SELTZER: Objection, your Honor. If Mr. Ritchie is going to repeat the testimony, I object.

THE COURT: I cannot --

MS. SELTZER: Mr. Ritchie is finding it necessary to repeat all the testimony. I do not see that that is necessary.

MR. RITCHIE: Your Honor, my question was -- I don't think my question was objectionable as repetitious. I've tried to negate any repetition.

Can you repeat the question, sir?

MS. SELTZER: I'll object again. It seems to me that Mr. Ritchie is just reciting everything that was told to us by the witness.

THE COURT: May I hear the question, please?

(Record read.)

THE COURT: What else was said.

Please ask simple, direct questions, if you will, Mr. Ritchie.

MR. RITCHIE: Y es, your Honor.

THE WITNESS: I was asked to leave the table, which I did leave the table.

THE COURT: Who asked you to leave the table.

THE WITNESS: Mr. Merolla asked me to leave the table, which I got up, left the table and walked over to the front of the restaurant.

BY MR. RITCHIE:

Q What, if anything, occurred next?

A About 15 minutes later, I returned to the table.

Q Was there any conversation at that time?

A There was arrangements made to have another meeting approximately 1 o'clock in the Candlelight Diner in Commack. Between 12:30 and 1.

Q Who made those arrangements?

A Mr. Merolla and Mr. Spatarella.

Q Who communicated with you?

A As to specifically which party, I do not remember.

Q Allright. After these arrangements were made, what, if anything, happened next?

A We all got up and left. I walked back to my car, got my car and then I went to the Candlelight Diner.

THE COURT: Candlelight?

THE WITNESS: Diner, your Honor.

Q Where is Chuckie's Charcoal Broil in relation to the McNamara Buick Pontiac job site?

A Approximately 12 miles south, southwest of the Candlelight.

MR. GILLEN: Your Honor, I would object to the leading because it's not the McNamara Buick Pontiac job site. It's the McNamara Re Nu-Car job site.

MR. MEISELMAN: Yes.

MR. GILLEN: So we keep it straight.

THE COURT: That is just to shorten things. Let's call it "The Job Site."

MR. MEISELMAN: Thank you, your Honor.

THE COURT: And agree that we mean the job site by its correct title from here on out and that

no other job site is involved in this case.

Proceed.

BY MR. RITCHIE:

Q Where was Chuckie's in relation to the job site?

THE COURT: That was his question, where was Chuckie's.

A It would be north, northeast. Approximately 12 miles.

Q How far away?

A Approximately 12 miles.

Q That's Chuckie's; is that correct?

A That's correct.

Q Where is the Candlelight Diner?

A The Candlelight Diner is in Commack.

Q What town is Chuckie's in?

A Port Jefferson.

Q Does Port Jefferson stretch 12 miles?

A What do you specifically --

Q Where is Chuckie's in relation to --

MR. MEISELMAN: I object.

A Approximately 12 road miles away.

Q Is there any diner just down the block from the job site?

MR. MEISELMAN: If your Honor please, I think

this is leading again. The witness has --

THE COURT: No, it does not suggest the answer. Is there or isn't there, if you remember?

THE WITNESS: Down the block? The one down the block is Chuckie's Charcoal Broil. It's a restaurant.

Q The block isn't 12 miles long, is it?

A No, it is not.

Q Where is the Candlelight Diner?

A It is in Commack, on the by-pass.

Q How far from the job site is that?

A Approximately 12 miles.

Q Now, what if anything occurred at the Candlelight Diner?

A I came into the parking lot of the Candlelight Diner and then I seen -- met Mr. Merolla getting out of his car.

Q Mr. -- what is his full name?

A I met Mr. Alphonse Merolla getting out of his car. Mr. John DeLiso, Mr. Rocco Merolla, Mr. Angelo Merolla and a person, the only name I knew him as is Fat Nicky, and then Mr. Spatarella came.

Q Besides Mr. Al Merolla and Mr. John DeLiso, do you see any of those individuals present in this Courtroom

today?

A Yes, I do.

Q What individuals do you see?

A I see the one I know as Fat Nicky.

Q Who, if anyone else, do you see in this Courtroom today?

A I see Mr. Angelo Merolla.

Q Can you indicate where in the Courtroom the individual you know as Fat Nicky is?

A Sitting next to Mr. Alphonse Merolla.

Q And that's the male, is that correct?

A That is correct.

Q Where is the individual you know as Angelo Merolla?

A In the back of the Courtroom.

Q Can you describe what he is wearing?

A Tan jacket and reddish shirt. In the back row, all the way.

Q Which side of the Courtroom, as you are looking?

A Left-hand side.

Q How many from the left wall of the building? Of the --

A Second, second party.

Q From the left; is that correct?

A That's correct.

MR. RITCHIE: Let the record reflect that the witness has identified as Fat Nicky the defendant captioned Alphonse Merolla.

THE COURT: Is that agreed, Mr. Leone?

MR. LEONE: Yes sir.

Q What, if anything, occurred at the Candlelight Diner?

A We all walked into the diner and went to a table.

Q Who, if any -- what, if anything, occurred next?

A We sat down at the table, got into a conversation and Mr. Alphonse Merolla said again they're 25 percent partners in the McNamara job and that I'd -- I'd better get the job straightened out, and I had said again, "I'm behind on the money. I just can't do it."

And Mr. Merolla says "Well, I guarantee it."

So I says "Who are you to guarantee it?"

Then he got mad at me, picked up a knife off the table and stuck it in my side and he says "I ought to kill you' here and now."

Q And what, if anything, occurred next?

A Mr. Spatarella calmed him down.

MR. MEISELMAN: Objection, your Honor.

THE COURT: Just, if you will, tell us what was done.

See, when you say something like Mr. Spatarella calmed him down, you are telling the jury what you inferred from what you saw. But tell the jury what you saw occur and then they will form their own judgment about that.

A (Continuing.) Mr. Spatarella spoke to him. Then Mr. Spatarella got up and left and said "I don't want nothing to do with this," and left.

(Continued on next page.)

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Q What, if anything, did Mr. Spatarella say to Mr. Merolla?

A Just said, "Don't fool around in the diner," or "Don't get nasty in the diner."

Q Now, after Mr. Spatarella left, what, if anything, occurred next?

A I was told to go back to the job site in Port Jefferson.

Q You were told by whom?

A Mr. Alphonse Merolla.

Q Did you leave the diner?

A Yes, I did.

Q What, if anything, did you then do?

A I went to Len-Al's office and asked my brother to take a ride with me to Port Jefferson.

Q Your brother is who?

A Alan Goberman.

Q Did he take a ride with you?

A Yes, he did.

Q And did you go by car?

A Yes, we did.

Q Whose car?

A My car.

Q Where did you go in Port Jefferson?

Goberman-direct

A To the trailer at the job site.

Q What, if anything, happened while you were in the trailer at the job site?

A I got a call and I was told --

MR. MEISELMAN: Objection, your Honor.

THE COURT: You got a call and can you say to us from whom, or did you recognize -- first, did you recognize the voice of the person who called you?

THE WITNESS: I do not remember who called me. All I did was get a call and I was told to --

MR. MEISELMAN: Objection, your Honor.

BY MR. RITCHIE:

Q As a result of that telephone conversation, what, if anything, did you then do?

A I then went over to the showroom downtown, the existing showroom.

Q That's the showroom for whom?

A For Mr. McNamara.

Q Is that McNamara Buick-Pontiac?

A McNamara Buick-Pontiac. It was on Main Street, down by the water in Port Jefferson.

Q Where did you go in that showroom?

A I entered the showroom itself.

Q Did you stay in the showroom?

A No, I did not.

Q Where did you then go, if anywhere?

A I went upstairs to Mr. McNamara's office.

Q Did Mr. -- which Mr. McNamara are you referring to?

A Thomas McNamara.

Q Can you describe the building and can you describe where in the building Mr. McNamara's office was located, Mr. Thomas McNamara's office?

A Yes, sir. You walk up a flight of stairs. You proceed straight down the corridor, to the last office on the left-hand side. You go through that office and behind that one is the office that was considered Mr. McNamara's private office.

Q Did you go in that office?

A Yes, I did.

Q Was anybody with you?

A Yes, someone was with me.

Q Who was that?

A My brother.

Q Who, if anyone else, was -- who, if anyone, was in the office when you went in there?

A Mr. Thomas McNamara, Mr. John McNamara, Mr. Alphonse Merolla, Mr. Angelo Merolla, Mr. Rocco Merolla,

Mr. John DeLiso and the person I know as Fat Nicky.

Q What happened in that office, if anything?

A Again I was told, I got problems on the job.

MR. MEISELMAN: Objection.

A (continuing) I had better get it straightened out.

Q Who told you that?

A Mr. Alphonse Merolla.

Q What, if any, further conversation was had?

A Then my brother was told to leave the office.

Q By whom?

A I do not remember now, sir.

Q But it was by one of the individuals in that room?

A That is correct.

Q Other than yourself? Is that correct?

A That is correct.

Q What, if anything, occurred after your brother left the office?

A I got in Mr. McNamara -- Mr. McNamara told them I was behind and I says, "The money is behind."

THE COURT: Wait. There are two McNamaras.

THE WITNESS: Mr. Thomas McNamara told them I was behind. I said, "Well, the money is behind."

Then Mr. Thomas McNamara says, "He did get his money." And I says, "I did not." He says, "I'm a goddamn liar."

BY MR. RITCHIE:

Q Who said that?

A Mr. Thomas McNamara.

Q What, if anything, happened next?

A Then I started getting punched and I went down. Then I started getting kicked around a little. By the -- I guess you could say all the people in the room.

Then I was picked up, put in a chair by the window on the right-hand side of the room and Mr. Alphonse Merolla says, "Give me the gun," and then John DeLiso handed him the gun. Then he stuck the gun down my throat, which was a .38 caliber revolver, and said, "I ought to kill you here and now."

Q Was there any other further conversation?

A Someone had said, "He's by the window, get him away from the window."

Q What happened next?

A I was taken away from the window and put by a desk, as you like walk in the room, at the face of it, as soon as you come through the door and to the left-hand side of it.

Then I was told, John McNamara says, "He has

four thousand dollars in his account. I want it." And I said--

Q At this point in time, what was your state of mind?

A Scared.

Q What, if anything, happened next?

A Mr. John McNamara says, "He has four thousand dollars in his account and I want it." I says, "No, I don't. I only got fourteen hundred dollars."

So he says, "Have him make a check out." I says, "I have --" -- I said, "I do not have a check."

And then he sent out for a check and it was brought in to me and I was told to make it out.

I says, "I'll only make it out for thirteen hundred dollars. I want to leave a hundred dollars extra in the bank in case close out the account," which I in turn made out a check to Thomas McNamara for one thousand, three hundred dollars.

THE CLERK: Marked for identification as Government's Exhibit 15.

(Check so marked.)

(continued on next page)

1 Goberman - direct

DIRECT EXAMINATION

BY MR. RITCHIE (Cont'd):

Q I show you what has been marked as Government's 15 for Identification. I ask you if you recognize that document?

A Yes, I do.

Q What is that document?

A A check made out to Mr. Thomas McNamara for $1,300.

Q And when was that check issued by you?

A June 5, 1972.

Q And where were you when you issued that check?

A I was upstairs in Mr. McNamara's office.

Q Was this during the course of that particular meeting?

A Yes, it was during the course of the meeting.

MR. RITCHIE: Your Honor, I'd offer this in evidence.

MR. GILLEN: No objection, your Honor.

THE COURT: Received.

THE CLERK: Government's Exhibit 15 in Evidence.

(So marked.)

BY MR. RITCHIE:

Q Now, is Government's Exhibit 15 in Evidence the

type of check that was normally issued on the HarMac Contracting Corporation account?

A No, it is not.

Q Where did you obtain that check from?

A It was brought into the room for me to make out.

Q By whom?

A By Mr. John McNamara, just said, "Get a check," and eventually it came into the room and it was handed to Mr. John McNamara and was handed to me.

Q Now, at that time -- well, after that time, what, if anything, happened next?

A Then Mr. Thomas McNamara said, "I want the trailer signed over to me.

Q Which Mr. McNamara?

A Mr. Thomas McNamara.

Q And what if anything did you then say?

A I wasn't about to argue with them.

MR. GILLEN: Objection.

MR. MEISELMAN: Move to strike.

THE COURT: That was not what you were asked. On the motion to strike, your answer is stricken. Now, the question was?

(Question read.)

THE WITNESS: They eventually --

THE COURT: Just a minute. Make sure you have the question.

THE WITNESS: Mr. Thomas McNamara.

THE COURT: Just a moment.

(Question read.)

THE WITNESS: Yes. Then they sent out for a registration and a bill of sale, which was brought back into the room and I said I would not sign the registration at that time becuase they also wanted my car signed over to them.

MR. MEISELMAN: Move to strike, your Honor, and the witness -- can the witness please be instructed not to volunteer information?

THE COURT: Yes. Just tell us what you said in the room to the gentlemen who were in the room with you, Mr. Goberman.

THE WITNESS: Yes, your Honor.

I signed over -- I signed the registration and bill of sale for the trailer.

BY MR. RITCHIE:

Q Now, at the time that you signed over this check, Government's 15, what was your understanding of the consequence if you did not sign the check?

MR. MEISELMAN: Objection, your Honor.

THE COURT: I'm sorry? May I hear that, please?

(Question read.)

THE WITNESS: I was told I would be killed if I --

THE COURT: Just a moment. The objection is overruled. He may answer.

THE WITNESS: I was told if I didn't sign the check and the registration and the bill of sale, I would be killed, if I did not.

BY MR. RITCHIE:

Q Did there come a time when you signed the registration?

A Yes, there did come a time.

Q Prior to signing the registration, did you have any conversation with any individual in the room concerning the registration?

A Yes, I did.

Q What was that conversation?

A I had said I would not sign the registration in blank because they wanted my car also.

THE COURT: Because what?

THE WITNESS: They wanted my car signed over.

Q Who is they?

A All the individuals in the room.

MR. MEISELMAN: I'll move to strike, if your

Honor please.

THE COURT: Yes. The couldn't all have said it. Please tell us who said what?

THE WITNESS: Mr. Thomas McNamara wanted my car and trailer signed over to him and I told him the car did not belong to me. It was in the name of Len-Al, and he says, "Well, then, make the registration out," which it was made out and I signed it over.

BY MR. RITCHIE:

Q What -- when you originally saw the registration, what was the condition of the registration?

A It was blank.

Q What if any writing was placed on that registration before you signed it over?

A As to specifically what was written on it, I do not know.

Q Were you at any time given a copy of that registration?

A No, I was not.

Q Were you at any time given a copy of the bill of sale?

A No, I was not.

Q What was your understanding of the consequences, if you did not sign the bill of sale and if you did not sign

over the registration?

THE COURT: He's already testified to that, has he not?

MR. RITCHIE: Your Honor, he's only testified with respect to the check on March 15th. I'm sorry, on June 5th.

THE COURT: Very well.

THE WITNESS: I would have been killed if I did not sign everything over.

BY MR. RITCHIE:

Q Now, at the time that you were signing these items was your brother present in the room?

A To my knowledge, he was present when I signed the registration.

Q After signing over these documents, what if anything did you then do?

A I was told to go downstairs, to my car, and we were going to the bank, by Mr. John McNamara and Mr. Alphonse Merolla.

Q And what did you then do?

A We went, myself, John -- Mr. John DeLiso, Mr. Alphonse Merolla and my brother went downstairs to my car and Mr. John McNamara said to Mr. Alphonse Merolla, "He has the checkbook in the car. Make him open the trunk," which

I then opened the trunk and there was no checkbook in the car.

Q And what happened next?

A Thereafter, I got in the car with Mr. Alphonse Merolla and Mr. John DeLiso. Mr. John McNamara got in his own car. My brother was left outside by the fence and we proceeded to the bank.

Q And what if anything happened at the bank? What specific bank did you proceed to?

A The Tinker National Bank.

Q That's Marine Midland Tinker National Bank; is that correct?

A That's correct.

Q And what if anything happened at the bank?

A Myself, Mr. John DeLiso, Mr. Alphonse Merolla, waited in the front of the bank, and Mr. John McNamara went to the back of the bank and that's all that I knew that happened in the bank.

Q And did there come a time when you left the area of the bank?

A Yes, there was.

Q And where did you go then?

A Back to the showroom on Main Street.

Q Who if anyone was with you at the time?

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A Mr. John DeLiso and Mr. Alphonse Merolla.

Q And what happened when you arrived at the showroom?

A I got out of the car, spoke to them for a minute or two and then I went acoss the street to the Elks.

Q With whom?

A With whom?

Q Did any of the individuals -- who accompanied you to the Elks?

A I --

Q Did any of the --

MR. MEISELMAN: May the witness be given an opportunity to answer? I believe there has been -- the very question is being posed.

THE COURT: Yes.

THE WITNESS: Mr. Merolla, Mr. DeLiso, Mr. McNamara, John McNamara, did not accompany me to the Elks.

S fols.

(Continued on next page.)

MR. MEISELMAN: Move to strike.

THE COURT: To the where?

THE WITNESS: Elks.

MR. MEISELMAN: The question is who did go with him and not who did not.

THE COURT: Well, who went with you, if you know?

THE WITNESS: Subsequently I don't know if he came with me there or I met him inside -- I met a fence contractor.

Q Did you see any of the defendants later on that day?

A No, I did not.

MR. RITCHIE: Your Honor, would this be an appropriate time for a recess?

THE COURT: Yes.

We will have a short recess, members of the jury. Please do not discuss the case with one another or anyone not on the jury until it's given you to decide.

(Recess taken.)

DIRECT EXAMINATION

BY MR. RITCHIE (Cont.):

Q Now, subsequent to June 5th, did you continue working on the job site?

A Yes, I did.

Q And that was until June 28th; is that correct?

A That's correct.

Q During the course -- during that period, did you have occasion to see any of the defendants at the job site?

A Yes, I did.

Q What individuals did you see?

A Mr. Thomas McNamara, Mr. John McNamara, Mr. Alphonse Merolla and Mr. John DeLiso.

Q In that period of time, did you have any discussions with Thomas McNamara about the course of the construction?

A Yes, I did.

Q Do you recall what was said during the course of those discussions --

MR. MEISELMAN: May we have the date?

THE COURT: Yes.

As nearly as you can place it.

Q Approximately how many discussions did you have with Mr. McNamara -- was it one or more than one?

THE COURT: Was this after June 5?

MR. RITCHIE: Yes, your Honor.

A More than one.

Q Do you recall each of the conversations?

A No, I do not recall each of the conversations.

Q Do you recall any of the conversations?

A Yes, I do.

Q And can you fix a precise date on a particular conversation that you have a recollection of?

A As to a precise date, no.

Q Was it within that time frame?

A Yes, it was.

Q What, if any, conversation did you have with Thomas McNamara on the particular occasion that you recall --

MR. MEISELMAN: May the witness approximate the time, whether the first, second, or approximately within the time frame?

THE COURT: Would you do that?

THE WITNESS: Yes, your Honor.

Approximately with Mr. Thomas McNamara two to three occasions per week up until June 25.

Q One occasion that you have a specific recollection of, can you fix when in that time period it was?

A All right, specifically between the 6th and 12th as to the date I cannot give you the precise date.

Q What, if any, conversation did you have with him at that time?

A We were getting into arguments as to --

MR. MEISELMAN: Objection, your Honor.

THE COURT: Just give us as nearly as you can what you recall of the talk with Thomas McNamara.

THE WITNESS: Iwas pouring concrete and he said, "You had better do what you are told to do or you are going to get it again."

Q Did you have any other conversation with Mr. McNamara concerning contracts?

A Specifically, what do you mean "contracts"?

Q Well, did he ever use the word "contracts" in speaking to you?

A Yes.

Q Was it in that time period?

A No, it was later on, between the 20th and the 25th.

Q And can you relate the course of the conversation in which that was pursued?

A Yes, I can.

I was told by Thomas McNamara that he had $10,000 put away in a safe deposit box and he had a contract to have me hit.

Q What did you understand him to mean by "contract"?

A That there was a contract to have me killed.

Q Directing your attention to June 28, 1972, were you still working on the job at that time?

A Yes, I was.

Q And did you have occasion on that date to meet with any of the defendants?

A Yes, I did.

Q When did you first meet with any of the defendants?

A At the Pioneer Diner in Smithtown, approximately 9:30 in the morning.

Q What, if anything, happened at that time -- what, if anything, occurred at that time?

THE COURT: Well, who was there?

THE WITNESS: I was --

Q Which individuals were at the Pioneer Diner?

A I was in the diner, Mr. Alphonse Merolla came, Mr. John DeLiso and the person that I know as Fat Nicky came into the diner.

Q At that time what, if anything, occurred?

A I was told I was going to Mr. Thomas McNamara in Port Jefferson.

Q Who told you that?

A Mr. Alphonse Merolla.

Q And what, if anything, happened next?

A I had gotten into Mr. Alphonse Merolla's car with Mr. John DeLiso and Fat Nicky and proceeded to Mr. McNamara's existing building in Port Jefferson.

Q Did you go into the building?

A Yes, I did.

Q Where in the building did you go?

A I went up the stairs, went down the corridor, the first turn to the right, turned right and went down to the last apartment on the right-hand side, which was -- I was told -- Mr. Jim McNamara's apartment.

Q If you know, who is Jim McNamara with respect to any of the defendants in this case?

A Mr. McNamara's son.

Q When you say "Mr. McNamara," you are talking about --

A Mr. Thomas McNamara.

Q Is he related at all to John McNamara?

A Yes, Mr. John McNamara's brother.

Q What, if anything, occurred in Mr. Jim McNamara's apartment?

A I walked into the apartment and in the apartment was Rocko Merolla and Angelo Merolla and I went in with John DeLiso, Alphonse Merolla and Fat Nicky.

Q What, if anything, occurred in that apartment after you got in there?

A I was told I was going to sign a contract release and be given $25,000.

Q Who told you that?

A Mr. Alphonse Merolla.

Q During the course of that conversation, did anybody else enter the apartment?

A Yes, Mr. John McNamara entered the apartment.

Q And after Mr. John McNamara entered the apartment, what, if anything else occurred?

A I was told that I was going to sign a release and be given $25,000 and the time I said "I wanted to call my attorney."

Q After you said that, what, if anything, occurred next?

A I was beaten up and after I was beaten up I said I would sign the release.

Q Who beat you up?

A John McNamara, Rocko Merolla, Angelo Merolla, John DeLiso, Fat Nicky and Alphonse Merolla.

Q After you were beaten up, was there any further conversation?

A I was told to sign the release and at an appointed time it was sent out for -- the release and for another document -- and it was brought in.

Q Who told you you were going to sign the release?

A Alphonse Merolla.

Q Who sent out for this document, if you know?

A Mr. John McNamara.

Q Did there come a time when you were presented with this contract release?

A Yes, there did come a time.

Q Who presented that contract release to you?

A Mr. John McNamara.

Q After receiving the contract release, what, if anything, did you then do?

A I signed the release and the other document, and the people that brought it into the room had left.

Q If you know, who were the people that brought these documents into the room?

A One was a notary, Alex Gniazdowski, that works for Mr. McNamara, and one was a girl by the name of Dorothy -- that's all I know.

Q What if anything did the notary do while he was in the room?

A Notarized my signature.

Q On how many documents if you recall?

A Two documents.

THE CLERK: Marked for identification as Government's Exhibit 16.

Marked for identification as Government's

Exhibit 17.

(So marked.)

Q I show you what has been marked as Government's Exhibit16 for identification and I ask you if you recognize that document?

A Yes, I do.

Q What is it?

A Agreement of cancellation of contract and release --

THE COURT: Is that 16?

THE WITNESS: Yes, your Honor, it is 16.

Q And when did you first see that document?

A What do you specifically mean, "When did I first see it?"

Q When was the first time you saw this document or the original thereof -- that's a copy, is it not?

A Yes.

Q When was the first time you saw the original of that document?

A I had never seen the original of the document.

Q I direct your attention to page 3 of that document --

THE COURT: The document he has before him, Exhibit 16 for identification.

Q Do you see anything placed on that document by yourself?

A Yes, I do.

Q What do you see placed on that document by yourself?

A My signature.

Q Have you ever seen that document at any time -- the original of that document?

A No, I have never except the day of June 28th.

Q That is your signature, isn't it?

A Yes.

Q You did see that document on June 28th?

A Yes, I did.

Q Is that the contract release that you signed in James McNamara's apartment?

A Yes, it is.

Q I show you what has been marked as Government's Exhibit 17 for identification and I ask you if you recognize this document?

A Yes, I do.

Q What is that?

A "A receipt is hereby acknowledged in the sum of $25,000, paid by McNamara re --"

Q Please do not read it. It is a receipt.

A Of $25,000.

Q Did you sign that?

A Yes, I did.

Q Is that your signature, "H. Goberman"?

A That's correct.

Q That was signed at the time this meeting that you just related?

A That's correct.

MR. RITCHIE: Your Honor, the Government would offer 16 and 17 into evidence.

(Shown to counsel)

MR. GILLEN: No objection, your Honor.

THE COURT: Received.

THE CLERK: Now Government's Exhibits 16 and 17 in evidence.

(So marked.)

MR. RITCHIE: Your Honor, I would request permission to read these two documents to the jury.

THE COURT: You may.

MR. RITCHIE: Thank you.

Government's Exhibit 16 in evidence reads as follows:

"Agreement of cancellation of contract and release. Agreement made this 28th day of June, 1972 by

and between McNamara re New Cars, Inc., a domestic corporation, having its principal place of business at 102 Main St., Port Jefferson, New York, hereinafter referred to as owner, and Harry Goberman, residing at 118 Southern Boulevard, Hoppauge, New York, and/or Carmac Contracting Corporation, a domestic corporation, having its principal place of business at Port Jefferson, New York, hereinafter referred to as builder.

"Whereas the owner and builder are parties to a construction contract dated February 24, 1972 calling for the construction by the builder of an automobile sales and service facility and a used car facility on owner's property located on the north side of Nesconset Highway at Port Jefferson station, New York, and whereas the parties are mutually dissatisfied with the progress of the work performed to date and fully agreeable to cancel said contract with respect to each other.

"Now, therefore, for and in consideration of the sum of $1 and other good and valuable considerations, it is hereby agreed as follows:

"1. The owner hereby releases the builder from any future performance pursuant to the terms of the aforementioned contract.

"2. Builder nevertheless agrees to remain liable

for any and all claims the owner may now have or hereafter have against the builder with respect to all work performed for which builder has failed to perform pursuant to the terms of the aforementioned contract.

"3. The builder acknowledges that he has received payment from the owner for any and all work performed to date and further represents that he has paid all subcontractors, laborers and material men all monies due to them for all work performed to date.

"4. Builder hereby releases and discharges the owner McNamara Cars, Inc., Thomas McNamara and John McNamara, individually and collectively, from any and all actions, causes of action, suits, liabilities, claims and damages which the builder may now have or which he or his successors may hereafter have against the above-mentioned parties, resulting from the aforementioned contract.

"5. Builder further agrees and hereby waives any and all right he may now have for which he or his successors may hereafter have to file a mechanic's lien or any other lien against the owners' property in Port Jefferson Station, New York, resulting or flowing from the aforementioned contract.

"6. The builder further agrees to indemnify and

save and hold harmless the owner from any and all liens, suits, or actions which all subcontractors, laborers or material men may now have or hereafter have with respect to the work performed pursuant to the terms of the aforementioned contract.

"The builder agrees to defend at his own cost and expense any such claims, suits or liens asserted or filed by said subcontractors --"

THE COURT: You're reading makes Mr. Goberman hoarse.

MR. RITCHIE: It's making me hoarse, too, your Honor.

"--builder agrees to defend at his own cost and expense any further claims, suits, or liens asserted or filed by said subcontractors, laborers or material men.

"In the event that builder fails to so defend such actions, lawsuits, liens, asserted or filed against the owner, the builder agrees to be liable for all costs of the owner, legal or otherwise, which the owner may incur with respect to the defending of any such claims, lawsuits or liens.

"7. This agreement may not be changed orally.

In witness whereof the undersigned hereto affixed their hands and seals, the date and year first above written."

It is signed by Harry Goberman for Harmac Contracting Corporation -- it is signed individually Harry Goberman, Harmac Contracting Corporation by Harry Goberman and McNamara re New Cars, Inc. by Thomas McNamara.

On the fourth page of the document are fairly complex notarizations. I won't read them. The top two notarizations are by Alex Gniazdowski and it refers to Harry Goberman and Harry Goberman for Harmac--

THE COURT: Will you gentlemen step up for a moment?

(The following transpired at the side bar.)

THE COURT: I thought that maybe you ought to read it all. Isn't that the meeting that there is going to be further testimony as to?

MR. RITCHIE: Yes.

THE COURT: Maybe it would be best to read the dates and all. It is a little more troublesome, but --

MR. RITCHIE: Yes, your Honor.

(The following transpired in open court.)

(continued next page)

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MR. RITCHIE: The fourth page reads as follows:

"State of New York, County of Suffolk.

"On the 28th day of June, 1972, before me personally came Harry Goberman, to me known to be the individual described herein, and who executed the foregoing instrument and acknowledged that he executed the same."

That is Alex Giandowski, Notary Public, State of New York, with his number.

"State of New York, County of Suffolk.

"On the 28th day of June, 1972, before me personally came Harry Goberman, to me known, who being by me duly sworn did depose and say that he resides at 118 Southern Boulevard, Hauppauge, New York; that he was the President of Harmac Contracting Corp., the corporation described herein, and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order."

Signed Alex Giandowski, Notary Public, State of New York, with his stamp.

"State of New York, County of Suffolk.

"On the 28th day of June, 1972, before me personally came Thomas McNamara, to me known, who being by me duly sworn did depose and say that he resides at number 81 Oldfield Road, Oldfield, New York; that he is the president of McNamara Re Nu-Cars, Inc., the corporation described herein, and which executed the foregoing instrument; that he knows the seal of said corporation, that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

And that is signed"Sandra L. Bezell, Notary Public, State of New York."

Government's 17 is in a letter form. It has the letterhead, Harmac Construction Corp., Harry Goberman, 118 Southern Boulevard,Hauppauge, New York, 11787. Dated June 28th, 1972, addressed McNamara Re Nu-Car, 102 Main Street, Port Jefferson, New York, 11777.

"Dear Sir:

"Receipt is hereby acknowledged of the sum of $25,000 paid by McNamara Re Nu-Car, Inc. in consideration for execution of agreement dated June 28th, 1972 releasing the undersigned from future performance,

pursuant to terms of building contract dated February 24, 1972."

There then appears an apparent erasure of some sort, both at the beginning of and the -- at the beginning of the margin are the initials HG and at the right after the erasure is again HG, and this is signed Harmac Construction Corp., by, signed Harry Goberman, and Harry Goberman with the signature Harry Goberman, and it is notarized, Alex Giandowski, 28th June, 1972, Alex Giandowski, Notary Public, State of New York, with his stamp.

DIRECT EXAMINATION

BY MR. RITCHIE: (Cont.)

Q At the time that you signed these documents, what was your understanding of the consequences if you failed to so sign them?

A I would be killed.

Q Subsequent to your signing those two documents, what if anything then occurred in that office?

A After I had signed the documents and the notary and the woman left, then I started to get a good beating. I was stripped and called a rat bastard, "You went to the D.A.," which I denied. Then they started, went through my clothes and everything and said "You got a bug on you." Which I said

no. Then I was -- Merolla took a gun out, pointed it at me and said "I'm going to kill you and bury you in a lime pit."

Q Had you at any time prior to this date gone to any law enforcement authority?

A Yes, I did.

Q To whom?

A Thomas Gill.

Q When was that?

A After the June 5 beating.

Q What was the substance of your complaint to Mr. Gill?

MR. MEISELMAN: Objection, your HOnor.

THE COURT: You have heard the witness' testimony about the other matters. It is now being asked what if anything he told to Detective Gill, and you will hear that not for the purpose of having that offered to you as evidence of what occurred, but as evidence simply of what the witness said to Detective Gill after this earlier occasion.

BY MR. RITCHIE:

Q What did you tell him about, without going into detail?

A I told him about the incident of June 5.

Q Was anything said on this June 28th meeting

about the lime pit?

A I was told that I was a rat bastard, I went to the D.A. and they are going to kill me and put me in a lime pit. After they said --

Q Who told you that?

A Mr. Alphonse Merolla.

Q Who was present at the time that Mr. Merolla, Alphonse Merolla, told you this?

A Angelo Merolla, Rocco Merolla, John DeLiso, Fat Nicky and John McNamara.

Q And after this conversation, what if anything occurred next?

A Eventually the beating ended, I got my clothes back on and someone said they called a cab for me.

Q Do you recall who said that?

A I do not recall who said they called a cab.

Q And what did he then do?

A Waited in the room for approximately 5, 10 minutes -- I cannot give you exact length of time -- then I was told the cab was downstairs. John DeLiso accompanied me downstairs. I got in the cab and went to Smithtown.

Q Where did you go in Smithtown?

A Back to where I had left my car.

Q What did you then do?

A Got out of the cab, paid him, went to the front entrance of the diner for a couple of seconds, went in, got another pack of cigarettes, came out, got in my car and then I proceeded towards Len-Al's office.

Q By that time had you received any money from any of the defendants?

A Pardon me?

Q By that time had you received any money from any of the defendants?

A No, I did not.

Q And after entering your car and proceeding off to Len-Al, what if anything occurred next?

A I was stopped by two police officers.

Q And what if anything happened after you were stopped?

A I was asked for my license and registration. And then they told me to get out of the car, which I did, and then I was told to open up the car and they searched the car.

Q Did you present them a license?

A An expired license.

Q In whose name?

A Harry Masterson.

Q And what if anything was taken from your car by these individuals?

A Nothing.

Q And after searching your car, what if anything occurred next?

A I was told to accompany them to the police station.

Q Were you in your car or in their automobile?

A In the police automobile.

Q And what happened at the police station?

A I was brought in and they started to question me for a while. Then I was told to come downstairs.

Q Well, I don't want any conversations with the police officers, but can you describe your condition at the time; what was your physical condition at the time?

A I was hurt.

MR. MEISELMAN: I'm going to move to strike, if your Honor please.

THE COURT: That's pretty general. Could you give the jury some specific data from which they could form a judgment.

THE WITNESS: I was limping and I was black and blue._

Q Did you have occasion to call anyone while you were at the police station?

A Eventually there came a point in time when I

called my attorney.

Q Who was that attorney?

A Emanuel Starlos.

Q Did there come a time when you left the police station on that date?

A Yes I did.

Q Who if anyone accompanied you?

A My attorney.

Q Where did you go from there?

A To Len-Al's office.

Q Did there come a time on that day when you went to a doctor's office?

A Yes, there did come a time.

Q Do you recall the name of the doctor that you went to see?

A Dr. Punturo.

MR. RITCHIE: Mark this.

THE CLERK: Document marked for identification, Government's exhibit 18.

(So marked.)

Q Now I show you what has been marked as Government's 18 for identification and I ask you if you have ever seen that document before?

A Yes I have.

Q What is that document?

A It's a letter from the doctor.

THE COURT: Don't give us the content.

A So stating my injuries.

THE COURT: How does that doctor spell his name?

THE WITNESS: P-u-n-t-u-r-o.

Q When did you first see that document?

A The day the doctor had given it to me.

Q That was at June 28th or was it on another date?

A It was on June 28th.

MR. RITCHIE: Your Honor, the Government would offer this in evidence at this time.

MR. MEISELMAN: I would most strenuously object.

MR. GILLEN: It is properly offered through the doctor, your Honor.

MR. RITCHIE: Yes, your Honor. I will withdraw the offer.

May I have a second, your Honor?

THE COURT: Certainly.

(Pause.)

MR. RITCHIE: Your Honor, the Government has no further questions of this witness at this time.

MR. GILLEN: May I proceed, your Honor.

THE COURT: Yes, certainly.

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MR. GILLEN: May we have a slight side bar first, your Honor?

THE COURT: Yes.

(Side bar.)

MR. MEISELMAN: I am- going to make application, your Honor -- up until now we have been taking witnesses as they come along, but when this matter was originally prepared Mr. Gillen and I had agreed that Mr. Gillen, in the defense of John, would cover certain aspects of cross and I would do the balance of cross and the case was prepared on that basis.

I would like, your Honor, in view of the massive amount of cross-examination and documents that the information to be elicited, particularly in light of previous testimony in the trial and previous depositions, that the familiarity which is required with it and in the preparation of it, that Mr. Gillen be allowed to conduct cross-examination of the witness with respect to his topics and I be allowed to cross-examine them with regard to mine.

THE COURT: The old one too.

MR. MEISELMAN: No duplication, your Honor.

MR. RITCHIE: In light of the fact that that was the plan, reluctantly the Government won't oppose it.

THE COURT: Without setting any precedent.

MR. RITCHIE: Without setting any precedent whatsoever.

THE COURT: I think it is unusual, but the circumstances are unusual and I think we would say nothing about it.

Do you know how many of them are experienced jurors?

MR. FISCHETTI: Very few.

MR. GILLEN: If any.

THE COURT: So they probably won't notice anything.

MR. GILLEN: I would like to apprise the Court that right at the beginning of my examination I am going to request the reading of the synopsis of Copeland's murder testimony.

I am going to ask him one or two questions and I am going to request that that be read.

THE COURT: All right.

MR. MEISELMAN: One more thing, your Honor --

THE COURT: Have you gentlemen been over that transcript? Is it all right?

MR. GILLEN: Yes sir.

MR. RITCHIE: I am satisfied with it. I hope

your Honor doesn't mind that I am going to make an objection in front of the jury on the grounds that it is improper cross-examination.

THE COURT: You have to protect the record. I don't know what you can do about it, but I agree, you object.

I think for whatever psychological value it has in front of the jury, you may do so, fine.

MR. FISCHETTI: In addition to the reading, your Honor, you had a preamble last time which we would request.

MR. MEISELMAN: Except, your Honor may have to change this, the first paragraph, unless of course -

THE COURT: I will see as we go along.

MR. MEISELMAN: With respect to my cross-examination, your Honor, I want to get the attention of the jury -- Mr. Ritchie did not pursue it that far -- the letter of the bill of particulars written by Mr. Ritchie in which he alleges that the Government will claim that a tender was made.

Perhaps your Honor would care to do it --

THE COURT: What's the point?

MR. MEISELMAN: To show that the Government -- in effect, it is an admission by the Government that a

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consideration was tendered to this man, an alleged consideration --

THE COURT: I am afraid Gerald Ford didn't sign it.

MR. MEISELMAN: Mr. Ritchie did on behalf of the United States Government.

MR. RITCHIE: I think we went through this the last time and I was all ready with my dictionaries at that time.

I used the word tender in the sense that it was offered him, not in the sense of a formal tender the way --

THE COURT: You mean the $25,000?

MR. RITCHIE: All that was said was who paid the 25 --

MR. GILLEN: The question in the bill of particulars, "Will the Government claim a tender or lack of a tender?" And the answer was in the form of a bill of particulars that the Government would claim a tender.

MR. RITCHIE: If there is any variance from the bill of particulars, I submit that it is not a fatal variance whatsoever.

At the last trial it was made quite clear to

defense that the Government did not mean a formal tender but only meant that it was stated to him that he would be paid $25,000, and Mr.Gillen and Mr. Meiselman, if he has read the record, would have been aware of that.

MR. MEISELMAN: I read the records. I am also aware of the fact, Mr. Ritchie, that in all this period of time you have never served an amended bill.

MR. RITCHIE: I didn't consider it necessary to serve an amended bill since they were--

THE COURT: These lawyers trained in criminal law don't really know what a tender is, I think is the Government's contention.

MR. MEISELMAN: I think any lawyer knows what a tender is, Judge. It is a crucial question in the case --

MR. LEONE: Judge, Mr. Merolla asked to be excused to go to the men's room.

THE COURT: Shall we have a recess? You will have to wait for Mr. Merolla.

MR. MEISELMAN: Do I understand then that we can't --

THE COURT: We are not going to get this before lunch. If he wants to be relieved of it then I think

maybe you can say now that you move of record to be relieved of that statement in the bill of particulars, if there was a mistake.

MR. RITCHIE: I would so move.

THE COURT: A mistake of understanding as to what the word "tender" meant.

MR. RITCHIE: I would so move.

THE COURT: Who prepared it, do you know?

MR. RITCHIE: I prepared it.

MR. MEISELMAN: I would have to strenuously object, your Honor.

THE COURT: Yes. I hear your strenuous objection.

MR. MEISELMAN: That on trial there is a change.

(Continued on next page.)

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CROSS-EXAMINATION

BY MR. GILLEN:

(In open court.)

THE COURT: Oh, the pause is because of the absence of Mr. Merolla. He'll be right back. All right.

MR. GILLEN: May I proceed, sir?

THE COURT: Certainly.

Q Mr. Witness, would you state your true identity, please?

A Harold Goberman.

Q Do you have any identification on you?

A No, sir, I do not.

Q Do you have any driver's license?

A No, sir, I do not.

Q Any social security card?

A NA, sir, I do not.

Q Any business cards?

A No, sir, I do not.

Q When is the last time you had a driver's license on your person?

A Probably a month ago, sir.

Q When is the last time you had any identification whatsoever on your person?

A Probably a month ago, sir.

Q Now, you are not in protective custody, are you?

A No, sir, Iam not.

Q Nobody is protecting you from anybody; is that correct?

MR. RITCHIE: Objection, your Honor. Irrelevant. No issue made.

THE COURT: No. You may ask the question.

Q Where do you live?

A 42 Ridge Road, Smithtown.

Q How do you get back and forth to here?

A By train.

Q When is the last time you've driven a car?

MR. RITCHIE: Objection, your Honor. Irrelevant.

THE COURT: Overruled.

A Sunday.

Q This past Sunday?

A That is correct, sir.

Q Today is October 9; is that correct?

A That's correct, sir.

Q So you drove a car October 6; is that right?

A That's correct, sir.

Q Drive it in the State of New York?

A Yes, sir, I did.

Q Did you have a license?

A No, sir.

MR. RITCHIE: Objection, your Honor. Improper cross-examination.

THE COURT: Overruled.

MR. RITCHIE: Prior moral act.

BY MR. GILLEN:

Q You told us that you were working under a number of names: is that correct?

A Yes, sir, it is.

Q What names werethey that you were working under?

A That I was working under --

Q Or are working under, whichever?

A I am working under the name of Harry Goldman.

Q Who are you working for?

A I am self-employed and I work for National.

Q National what?

A National Craft.

Q Where is that located?

A In Queens.

Q What's the address?

A I do not know the address, sir.

Q What's the phone number?

A I do not know that offhand. I'm only there a couple of weeks. I haven't been to work lately.

Q What's the cross street that it's located inbetween?

MR. RITCHIE: Your Honor, I'm going to object. It's not relevant at all.

MR. GILLEN: It is relevant.

THE COURT: You may inquire.

A I'd say, Francis Lewis Boulevard.

Q Where, what streets, between Francis -- it's on Francis Lewis Boulevard?

A No. It's on Jamaica Avenue.

Q And it's between Francis Lewis Boulevard and what?

A I -- I guess the closest street would be Springfield Boulevard.

Q You tell us you're working for yourself, also?

A Yes, sir, I am.

Q Do you have a business card?

A No, I do not.

Q Do you have a letterhead?

A No, sir, I do not.

Q Do you have a business phone number?

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A I use my parents' phone number.

Q What's that number?

A 365 9424. 516 area code.

Q Do you solicit business?

A In what respect do you mean that, sir?

Q Do you advertise?

A No, sir, I do not.

Q How long have you been working for this National?

A Approximately one month.

Q And prior to that, were you working for anyone?

A Yes, I was.

Q Who?

A ABG.

Q What's that?

A Construction firm.

Q Where is it located?

A Brooklyn.

Q Were in Brooklyn?

A In -- just off Knapp Avenue and Avenue U.

Q What's the address?

A I do not know, sir.

Q What's the phone number?

A I do not remember, sir.

Q Who hired you?

A Bernie.

Q Bernie who?

A I do not know his last name, sir. I didn't go to work that often.

Q Can you describe him for us, please.

A Pardon me?

Q What did he look like?

A A gentleman between 50 to 60. 200 pounds. And wore glasses.

Q How long did youwork for him?

A A couple of weeks.

Q How long? To your best recollection?

A A couple of week to my best recollection?

Q From what date to what date?

A I do not know that, sir.

Q What month was it in? Keeping in mind this is October 9, 1974.

A I would say approximately July.

Q Beginning of July, the end of July?

A I could not tell you that exactly, sir.

Q Your best recollection, Mr. Goberman?

A Sometime in July.

Q How did you get paid?

A How?

Q RIght.

A By check.

Q Where did you -- excuse me. What was the names on the checks?

A Harry Goldman.

Q How do you spell that.

A G-o-l-d-m-a-n.

Q What were you doing for this Bernie?

A Measuring and estimating jobs.

Q Did you have a bank account under the name of Harry Goldman?

A No, sir, I do not.

Q How did you cash your checks?

A Signed it Harry Goldman. My mother's endorsed the back of it and put it in her bank account.

Q Did your mother cash the checks for you?

A Yes, sir.

Q You say in July, this is when you worked for this ABC; is that correct?

A That's correct.

Q Whom did you work for before that?

A I have not worked from September 1973,

physically -- actual working and getting paid for it until July 1974.

Q And you've told us everybody you've worked for since July of '74?

A That's correct.

Q No doubt about that?

A No doubt about it.

Q Earn any other money other than what you have told us, that you worked for?

A Let me make one interruption. I think inbetween ABG and National, as part-time, I worked for another company, too.

(continued next page.)

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CROSS-EXAMINATION

BY MR. GILLEN (Cont'd):

Q What is that?

A Suffolk Builders.

Q Where are they located?

A Commack.

Q What's their address?

A I -- Jericho Turnpike, Commack.

Q What's the phone number?

A I do not know that.

Q Who hired you?

A Through one of the gids in the office.

Q Excuse me?

A Through one of the girls in the office.

Q A girl hired you?

A That's correct.

Q What is her name?

A Judy.

Q Judy what?

A I do not know her last name.

Q What did you tell her yur name was, if you did tell her a name?

A Harry Goldman.

Q How did you get paid?

A By check.

Q What was the check, what account was it written on?

A What account? Their account.

Q What's the name of their account?

A Suffolk Builders.

Q How much were you paid a week or a day or a month, however you worked?

A I was paid on a commission basis.

Q How many commissions did you earn?

MR. RITCHIE: Your Honor, I'm going to object to this whole line of questioning as irrelevant.

THE COURT: Yes. We are getting quite far afield now, Mr. Gillen.

Q Did you need any license for any of these jobs?

A No, sir, you do not.

Q You do not?

A No.

Q Did you submit any license for any of these jobs?

A When you work for someone you don't need a license.

Q You don't?

A No, sir.

MR. GILLEN: Excuse me one moment, your Honor.

THE COURT: Surely.

MR. RITCHIE: I'm going to object to the last question as not being responsive.

THE COURT: Let's see what happens next, Mr. Ritchie.

THE WITNESS: Excuse me?

MR. GILLEN: Your Honor, please. I have no question directed to this witness at this time.

THE WITNESS: I think I do need a license.

BY MR. GILLEN:

Q What was that?

A I said I probably did give them a license.

Q Where did you get the license?

A Where?

Q Yes.

A I applied for it.

Q To whom?

A I think New York City.

Q And you got the license?

A Yes, I did.

Q And you gave this license to this girl, what's her name?

A Oh, no, I never gave them the license.

Q Never gave who the license?

A The girl.

Q Did you have a license?

A I did have a license.

Q From whom?

A From New York City.

Q To do what?

A To sell.

Q Sell what?

A Home improvements.

Q What department of the city did you get this license from?

A New York City Department of Consumer Affairs.

Q Where is that located?

A In the city.

Q And you actually got a license; right?

MR. RITCHIE: Your Honor, I'm going to object to this line of questioning as being irrelevant.

THE COURT: No. He may answer.

Q You actually got a license?

A Yes, I did.

Q What name did you make application for the license under?

A Harry Goldman.

Q You used the name Birello?

A Pardon me?

Q Birello, B-i-r-e-l-l-o, or something like that, to get that license?

A No, I did not.

Q Where is the license now?

A Where is it?

Q That's right.

A At home.

Q Are you going home this evening?

A I really cannot answer that.

Q Could you bring it in for us tomorrow, please?

A If I do --

MR. GILLEN: If I may, your Honor --

THE WITNESS: If I do go to Smithtown, yes.

MR. GILLEN: Your Honor, may we have a direction that this so-called license be produced?

THE COURT: Well, we will see.

BY MR. GILLEN:

Q This is a license actually issued by the City of New York; isn't that right?

A That's correct, sir.

Q What did you put on the application for the license?

MR. RITCHIE: I'm going to object.

THE COURT: We are getting too far afield, Mr. Gillen.

MR. GILLEN: Your Honor, if I may, just a few questions? Because we've had testimony here --

THE COURT: No. We don't know whether it was ever issued or not.

Let's move along.

MR. GILLEN: I'll just ask for one moment, your Honor.

May I have these two documents marked for identification, please?

THE CLERK: Yes, sir.

Document marked for identification as Defendant McNamara's Exhibit E.

(So marked.)

MR. GILLEN: One sheet.

THE CLERK: One sheet.

MR. GILLEN: Two sheets.

THE CLERK: Two sheets marked for identification as Defendant McNamara's Exhibit F.

(So marked.)

BY MR. GILLEN:

Q What is your Social Security number, Mr. Goberman?

A 117 28 2475.

Q I show you this document. I ask you, is that your handwriting on the second page of Exhibit F for Identification?

A Yes, it is.

Q You signed this document; correct?

A I signed that page.

Q Will you look at the front page of it? Did you fill that thing out?

A Yes, I did.

Q I see.

What did you put for the Soecial Security number, if any, on that document?

A 117 28 2975.

MR. RITCHIE: Your Honor, I'm going to object to that entire line of testimony. I'm going to ask that it be stricken as being --

THE COURT: I'm sorry.

MR. RITCHIE: I'm going to ask that it be stricken as irrelevant.

THE COURT: Well, I'm sorry. Is that the Social Security number he had just given us?

MR. GILLEN: No, sir, it is a different one.

MR. RITCHIE: Different.

THE COURT: The motion to strike is denied.

MR. RITCHIE: Yes, your Honor.

BY MR. GILLEN:

Q Did you ever go to college?

A No, sir, I did not.

Q Did you ever tell anyone you went to college?

A Yes, I did.

MR. RITCHIE: Objection, your Honor. Irrelevant.

THE COURT: No, it is not irrelevant. It bears on his credibility as a witness.

MR. RITCHIE: Your Honor, may I have a side-bar on this?

THE COURT: Yes.

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(Continued on next page.)

(Side bar follows)

MR. RITCHIE: I don't mean to interrupt Mr. Gillen's cross-examination so frequently. I just want to make my point. My point is, your Honor, that this is improper cross-examination in that it is prior immoral acts, never resulting in any conviction.

If we are to bring out with every witness every lie -- so long as we have a sufficient investigation -- sufficient investigation and we bring out every lie the witness has ever told we are going to find ouselves in a position of needlessly confusing each and every trial we ever have. This is not connected whatsoever with lies told in this case, if any.

It doesn't -- hasn't resulted in conviction. It is really quite irrelevant to the issues of this case.

THE COURT: If these were immoral acts unrelated to credibility, that would be so. But these are directly on the issue of credibility.

MR. RITCHIE: Your Honor, I think that human experience shows us that ofttimes we will lie and yet we will be basically truthful.

MS. SELTZER: I wouldn't put anybody else in

the category. I resent having Mr. Ritchie insinuate that any of us are in the same category as Mr. Goberman.

MR. GILLEN: All liars?

MS. SELTZER: Or would ever fill out applications and lie, tell stories that he tells.

MR. RITCHIE: I heard some defense attorneys arguing with respect to the false bank loan case brought by the government that everybody lies on there.

MR. MEISELMAN: Everybody does not include --

MR. GILLEN: I never lied on an application.

THE COURT: You have heard --

MR. RITCHIE: Not before a Court of law but before a jury. Trusting to their common experience. If we are going to make a decision on the relevance of it, we must do it on the basis -- the Court must do it on the basis of its common sense appreciation and the question of relevance as opposed to confusion of issues.

THE COURT: I think if that be the case, that we can safely entrust it to the jury's judgment. If they think this is all in the common course of human behavior according to their experience, then they are just going to take it out on Mr. Gillen for

wasting their time explaining that this man's background is no different from anyone else.

MR. RITCHIE: Yes, your Honor.

MR. GILLEN: Thank you, your Honor.

(In open Court.)

CROSS-EXAMINATION

BY MR. GILLEN:

Q Who did you tell you went to college to, Mr. Goberman?

A Anyplace that I applied for a job.

Q What college did you go to or did you say you went to?

A Fairleigh Dickinson.

Q Did you pick out any other colleges?

A No, sir, I did not.

Q You are certain of that?

A I am indeed certain of it.

Q Did you put down you had any degrees?

A No, sir, I did not.

Q That is anyplace you have ever made an application for a job, you would put down that you are a college graduate, is that correct?

MR. RITCHIE: Objection. Asked and answered.

THE COURT: Yes, he has.

Q All right. Did you ever swear to the truth of these things?

A When you fill out an application for employment, you don't swear to a document.

Q What about when you fill out an application for a license, do you swear to that?

A I really do not know, sir.

Q Would it make any difference to you if you had to swear to it or not?

MR. RITCHIE: Objection, your Honor.

THE COURT: He may answer.

A As -- as in the present, if I needed a job, I would probably have to swear to it because I needed the job.

Q Would it make any difference to you whether or not you had to swear to it?

A Yes, it would but if it meant my getting the job, I would swear to it.

Q What about if it meant your getting a driver's license, would you swear to something false there?

A Yes, I would.

Q What about if it meant if you got a pilot's license, would you swear to something false there?

A Yes, I would.

Q When was this that you made applications for this license to the Consumers Affairs Bureau?

A I'd say, approximately May, June or July.

Q What is your best recollection?

THE COURT: Of the current year?

A Of 1974.

Q What is your best recollection as to the date you made out this application?

A That is my best recollection of the date, sir.

Q Did you tell on that application that you went to Fairleigh Dickinson?

A I would not know, sir.

Q You made out any other applications for licenses since that time?

A No, sir, I have not.

Q Now, I show you defendant's -- is that E, Mr. Walsh?

THE CLERK: Sir?

MR. GILLEN: I am sorry.

THE CLERK: E.

Q I show you defendant's E for identification. Did you ever see that before?

A Yes, I have.

Q What is it?

A New York City, Department of Consumers Affairs, License, Insurance Division, 80 Lafayette Street, New York.

Q This is an actual license issued? Is it?

A I really do not know if it is the actual license.

Q But you have told us, you did actually get a license?

A That's correct, sir.

MR. GILLEN: I'd offer both these documents in evidence, your Honor.

MR. RITCHIE: Objection.

MR. GILLEN: If this is a convenient time to break?

MR. RITCHIE: Your Honor, the government would oppose the admission in evidence of these two exhibits. He's already stated on the record that he did not tell the truth in this application and this would needlessly confuse the record. It has no purpose other than to impeach the credibility of this witness.

MR. GILLEN: That is the precise purpose of it, your Honor, is to impeach his credibility.

MR. RITCHIE: And there is no impeachment in that he has admitted that he did not tell the truth on that application.

MR. GILLEN: Or tell the truth here, Mr. Ritchie.

MR. RITCHIE: There is no inconsistency.

THE COURT: Well, I don't think we need the exhibits. I think, as Mr. Ritchie has pointed out, the critical things have already been stated by the witness.

MR. GILLEN: No, sir. We are going to submit to the Court a subpoena duces tecum to be so ordered on the Consumers Affairs Bureau. For this alleged license. Which he swears he has.

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MR. RITCHIE: May we have this marked for identification?

If there is any need for comparison, we can do that at an appropriate time.

THE COURT: Yes.

MR. GILLEN: Is this a convenient time to recess for lunch?

THE COURT: Yes.

Now, members of the jury, we will recess until five minutes after two.

Please do not discuss the case with yourselves or anyone not on the jury until it is given to you to determine.

(Jury leaves courtroom.)

MS. SELTZER: I would ask that the witness be excused.

MR. GILLEN: I would like an instruction in view of this --

MR. MEISELMAN: Excuse me, I do not know who is standing in the courtroom.

MR. GILLEN: -- the Government not be permitted to prepare Mr. Goberman.

If your Honor remembers the last time I asked him about his license, one day he did not have the license, the next day he came in with the Masterson

license. We had an investigation here and that investigation has determined that there is no such license, but the number on this particular license is issued in the name of some other person.

THE COURT: So what about that?

MR. GILLEN: I say --

THE COURT: This is on a collateral issue.

MR. GILLEN: He has sworn --

THE COURT: You will be bound by his answer on collateral issues.

MR. GILLEN: Then it is perjury.

THE COURT: That is too bad. It can be the subject of a separate indictment.

MR. GILLEN: It will not be.

THE COURT: I cannot help that.

We are here to try the issues of the use of violence on Goberman and its effect on interstate commerce.

MR. GILLEN: If we used Birello, it still comes on his credibility, which is another alias he did not admit to when Mr. Ritchie --

THE COURT: Not when it becomes a matter of a collateral issue. It is a collateral issue. You are bound by the answer.

MR. FISCHETTI: May I be heard briefly?

THE COURT: Yes, certainly.

MR. FISCHETTI: It is my understanding that on a collateral issue, the impeachment of a witness --

THE COURT: During examination.

MR. FISCHETTI: He will still be under examination this afternoon.

MR. GILLEN: I ask that we read the murder testimony next.

THE COURT: Very well.

(Luncheon recess taken.)

AFTERNOON SESSION

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MR. RITCHIE: Are we ready to proceed?

THE COURT: No, I thought I had better come in and make sure that you gentlemen thought that we ought to wait for juror number seven. I wouldn't want to use up another alternate on the second or third day of trial. The juror is only a quarter of an hour late as of now.

MR. MEISELMAN: While we are waiting, may I state to the Court that my investigator has served a subpoena duces tecum on the Tinker Marine Midland Bank, and was advised that they had given up their records and they weren't sure to whom.

May I ask Mr. Ritchie if he has those records?

MR. RITCHIE: I have certain records subpoenaed at the time back in the Grand Jury stages. I will make them available to the defense.

THE COURT: Will you do so.

MR. MEISELMAN: Thank you.

May we have them, sir, so I may use them on cross-examination?

MR. RITCHIE: If they are proper cross-examaination.

THE COURT: Please.

MR. RITCHIE: Yes, I will turn them over.

Your Honor, may I step outside while we are

waiting?

THE COURT: Yes.

(Pause.)

(Jury present.)

H A R O L D G O B E R M A N , called as a witness, having been previously duly sworn by the Clerk of the Court, resumed the stand and testified further as follows:

THE COURT: All right, Mr. Gillen.

MR. GILLEN: Your Honor, at this time I would most respectfully request that the Court read to the jury the agreed-upon synopsis of the testimony given by this witness, Mr. Goberman, in the case of People versus Sommer in Suffolk County.

MR. RITCHIE: I would like to note the Government's objection on the grounds of United States versus Bow, 360, Fed. 2nd at Page 14.

THE COURT: We have reviewed that question earlier, Mr. Ritchie, and I must overrule your objection to the reading.

MR. GILLEN: Thank you.

THE COURT: Now, members of the jury, Mr. Gillen has brought up here the question of the testimony that Mr. Goverman gave in a certain trial -- a murder case -- in the State Court.

Now, in the criminal case of the People of the

Goberman

State of New York against Samuel Sommer, in the County Court of Suffolk County, in which the defendant Samuel Sommer was charged with having murdered Irving Silver on May 17th, 1968. The witness, Mr. Goberman, was in 1970 called by the prosecution as a witness for the prosecution. He testified on direct and cross-examination. Rather than present all his testimony to you in question and answer form, I will summarize the testimony that he gave.

Now, this summary forms part of Mr. Gillen's cross-examination of Mr. Goberman and it is for you to consider for the light, if any, that you find that it throws on the credibility of Mr. Goberman as a witness here and the credibility of his testimony here before you. It has no other relevancy in this case.

Now, in that case -- the People against Sommer-- Mr. Goberman was sworn as a witness and he testified thus:

In early February of 1968 Mr. Goberman was doing work on a building or rebuilding job on a delicatessen or deli in which Samuel Sommer, the defendant, Salvatore Spatarella and possibly a man named Irving Silver had interests. Sommer and Silver were also partners in a separate meat business. Spatarella and

Goberman

4 Sommer were indebted to Mr. Goberman in the order of nine to twelve thousand dollars on account of the deli job -- the delicatessen job -- and were behind in their rent and Sommer and Silver were behind in their meat bills.

Mr. Goberman was fearful that he would lose his investment in the deli job, if there was a foreclosure of the deli and its credit collapsed.

In any event, a complicated check transaction took place in February of 1968. Spatarella and Samuel Sommer gave Mr. Goberman a check issued by a hospital for two thousand, one hundred and fifteen dollars, which was a good check. That check Mr. Goberman cashed. Mr. Goberman then drew a check in the same amount payable to Shepherd's Meats for meat supplied to the Sommer-Silver partnership.

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THE COURT: (Continuing) Now,the principal in Shepard's Meats was said to be a man named Greenbaum.

Mr. Goberman's check was not paid and Mr. Goberman issued a second check to Shepard'sMeats dates February 9, in the same amount and that was not paid.

At or about the same time, Mr. Goberman testified he paid the deli's rent with a check for $850 and advanced some cash which was possibly used to pay pending meat bills due to Hebrew National Meat Company.

The bad checks apparently gave rise to a complaint which was being processed before the events hereinafter related by Det. Mottola, who was connected with the District Attorney's Office, Suffolk County, and Det.Motolla knew in that connection the identities of Spatarella and possibly of Irving Silver and of their interest in the delinquent checks.

Det. Motolla was urging Mr. Goberman to make restitution apparently on the checks. Now, Mr. Goberman testified that meetings occurred in April or May 1968, either at the Pioneer Diner or at the Dunkin' Donut which dealt with the making of arrangements between Mr. Goberman and Mr. Sommer to bring about the

death of Irving Silver, whose live was said, by Mr. Goberman's testimony, to have been insured in Mr. Sommer's favor.

The motivation of Sommer was in collecting that insurance. Mr. Goberman throughout testified that he did not intend at these times to participate in bringing about the death of Mr. Silver, but did want to keep on good terms with Mr. Sommer so that through him he could exert pressure on Spatarella, Sommer himself and Silver, to get payment of his construction money for the deli job.

Mr. Goberman testified that at a series of meetings on various dates, Sommer and he confected a plan to kill Irving Silver, the mechanics of which would be that Mr. Goberman, who knew how to start an automobile without using a key by simply short-cutting the panel and going directly from the coil to the battery, would steal an automobile. That Mr. Sommer would inveigle Mr. Silver into going with him to a place at which Mr.Silver, in one way or another, would be pushed into the path of the moving stolen vehicle and run down.

The first arrangement made in or about and perhaps earlier than May 10th, 1968, called for the episode to occur in the Bronx. Mr. Goberman testified

that the arrangement was that Sommer would get his Uncle Silver -- variously called his partner -- his uncle -- perhaps he was both -- to go with Sommer by automobile to the Bronx. On a street there selected by Mr. Goberman and Mr. Sommer in the Bronx, Sommer and Silver would emerge from the automobile in which they were and would be in the roadway when the stolen automobile would bear down on them.

Sommer would then jump out of the way, leaving Silver exposed to be killed.

The arrangement was put into effect, according to Mr. Goberman, to the extent that he went to a place called Mother's Diner in Huntington and there he engaged a stranger to drive the car that he was to use and that stranger in turn, hired another stranger to do it for him and Mr. Goberman testified that he did drive to the Bronx with that second man, not intending to carry through the plan and that he instructed the driver -- the stranger -- "when you get to the scene and they emerge from the car, you bear down on the man that you see jumping out of the way. Don't hit him, just frighten him."

Mr. Goberman testified that his purpose in doing this was to frighten Sommer into giving up his murderous project, presumably exposing to Sommer the

risk of personal disaster involved in it.

The plan having failed from Mr. Sommer's point of view, according to Mr. Goberman, talks resumed at the Pioneer Diner or the Dunkin' Donut and a new program was substituted for the old, which was that as before Mr. Goberman would steal a car and the rest of the arrangement was different in time.

Now, Silver lived in Queens somewhere. The plan was that Sommer would drive into Queens with Mr. Goberman in Mr. Goberman's car to a neighborhood where Silver lived.

Mr. Goberman would drop Sommer there and Sommer would get Silver to drive him back toward the Wheatley Hills Road area in Westbury.

They would then perpetuate the killing at a place to be preselected on Wheatley Hills Road. That was arranged on Thursday, May 16, 1968, in detail. At that point, Mr. Sommer was to shove Mr. Silver out of the car; the stolen car driven by Mr. Goberman was to strike Mr. Silver.

In any event, before Mr. Goberman did drive Mr. Sommer into Queens he and Sommer went to Wheatley Hills Road, preselected the place on the road near a fire hydrant as the place for the planned action and then set off for Queens.

5 Mr. Goberman testified that he dropped 388
Sommer at a place near Silver's apartment. Mr. Goberman had earlier met Silver in his apartment and so knew that it was not far from a White Tower Hamburger stop which was an all-night place and which had a telephone booth outside.

Mr. Goberman then turned around and drove back towards Bernie's Diner in Huntington from which they started out.

Mr. Goberman testified that he did not go directly back but wandered around on Long Island and did not get back finally to Bernie's Diner area until about 5:00 a.m..

He was, he testified, supposed to steal a car and then meet Mr. Sommer and his uncle at about 4:00 o'clock or quarter of , at the hydrant on Wheatley Hills Road.

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1 THE COURT: (Cont'd) He testified that he did not steal the car and that he did not go to the hydrant area on Wheatley Hills Road until perhaps a quarter after 4:00. When he did get there he drove from the point where Wheatley Hills Road leaves the Expressway to the end of it, four or five times passing the hydrant, these trips taking about a quarter of an hour without seeing even Mr. Sommer or Mr. Silver.

Mr. Goberman testified that he did not intend to prepetrate the crime, that he had not stolen the automobile, and that he meant when he got to Wheatley Road to dissuade and not to assist Mr. Sommer.

Mr. Goberman also testified that when he left Sommer in Queens near his uncle's apartment, he reached over the back of the front seat of his car, the floor between the back and the front seats, picked up a section of pipe or length of steel of the kind used in his trade to bound reinforcing rods, and gave that to Mr. Sommer.

Mr. Goberman testified that not finding Mr. Sommer or Silver on Wheatley Hills Road near the hydrant, he drove back to the neighborhood of Bernie's Diner in Huntington. He did not see Sommer's car there, but he did see a 1968 Buick that he believed was the car of Irving Silver.

2 He testified that he stopped, got out of his car and approached within 20 feet of the Buick and was afraid to go any farther because of what he feared he might see. He returned to his own car and drove to Farmingdale.

Mr. Goberman testifies that between that time and when he read about the death of Silver in the newspaper on Saturday, he heard only from a person whose name he had forgotten, that he had been driving on a road in Melville and had seen a badly messed up body of a man on the road. He didn't say who it was or that he had stopped and Mr. Goberman did not inquire.

Over the weekend the Suffolk County Police communicated with Mr. Goberman and asked him whether he knew anything about the death of Silver, and he said he did not.

Then, on Monday or Tuesday, May 20th or 21st, Mr. Goberman got in touch with the Suffolk County Police and met with two detectives from the police at the Pioneer Diner and there broached the question in hypothetical form: What would happen if someone who knew the complete details about a crime and came forward, could he expect a grant of immunity from prosecution for that offense?

Mr. Goberman testified that he was told that

unless he told everything that he knew first, the police would not discuss immunity. Very shortly -- apparently within some 12 to 36 hours -- Mr. Goberman gave a full statement, placed in evidence against -- People against Sommer to the public authorities, and he testified before the Grand Jury under a grant of immunity a day or two later. He there gave a version of the story, the same in critical details as which he gave at the trial of People against Sommer, as to the existence of a plan, the pre-existence of the Bronx plan, the background of the checks to some extent, and the innocence of his own participation.

All right, Mr. Gillen.

CROSS-EXAMINATION

BY MR. GILLEN (Cont'd):

Q Mr. Goberman, you told us on June 28th about 9:30, you met some of the defendant in the Pioneer Diner; is that right?

A Correct.

Q Is that the same Pioneer Diner that was referred to in testimony that his Honor just read?

A Yes.

Q Was that your testimony at that trial, the Sommer murder trial?

THE COURT: Roughly?

THE WITNESS: Yes, it was.

Q Is that a fair and accurate description of that testimony?

A Yes, it is.

Q Was it true?

A Yes, it was true.

Q Now, you mentioned a name, Spatarella in connection with June 5th; is that right?

A That's correct.

Q That was your rabbi, I think you said?

A That's correct.

Q Is that the same Spatarella that is menionted in that murder case?

A That's correct.

Q What time did you get up on June 28, 1972?

A Probably 7:00, 7:30 in the morning.

Q Is that the usual time you get up?

A About the usual time.

Q Where did you go?

A Where did I go?

Q Yes.

A After I left the house, I went to the Pioneer Diner.

Q Where were you living at that time?

A Town House Village.

Q Where is that located?

A On the Long Island Expressway and Briandale Road.

Q After you got up, you left your house and went directly to the Pioneer Diner; is that correct?

A Yes.

Q Are you sure about that?

A That's correct.

Q Now, who were youworking for at that time?

A Len-Al Contractors.

Q Did you go to Len-Al Contractors that morning?

A No, I did not.

Q You're positive of that?

A Correct.

Q Now, you told us you then met some of the defendants at the Pioneer Diner about 9:30; right?

A Correct.

Q Then you went down to the McNamara agency in Port Jefferson, the old agency we will say; is that correct?

A Correct.

Q What time did you get there?

A Approximately quarter to 10:00, 10:00 o'clock.

Q Then you described events that happened there

and there came a time when you left there in a cab; is that right?

A Correct.

Q What time was that that you left?

A I would say roughly around 10:30.

Q Then you told us that you went back to the Pioneer Diner for a pack of cigarettes, left there and were then picked up by two police officers; is that correct?

A Yes.

Q What time did that happen when you were picked up by two cops?

A I would say in the area of between 10:30 to 11:30.

Q And you were taken to the stationhouse?

A Correct.

Q How long were you at the station house?

A At least an hour.

Q So that would bring us to what time did you leave the station house?

A I would guess around 12:30, 1:00 o'clock.

Q And you sais that your attorney had come?

A That's correct.

Q How did he know that you were there, if you know?

6a Goberman - cross - Gillen

A Because I called him.

Q And he took you where?

A To Len-Al's office after.

Q What time did you get to Len-Al's office?

A Between 1:00 and 2:00, I would say.

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1 Goberman - cross - Gillen

CROSS-EXAMINATION

BY MR. GILLEN (Cont'd):

Q That's your best recollection?

A Yes, sir, it is.

Q He sent you on to a doctor?

A That's correct.

Q What time did you go to this doctor?

A Approximately around 2:00 o'clock.

Q About 2:00 o'clock in the afternoon?

A That's correct.

Q How long were you at the Len-Al office, before you went to this doctor?

A I would say 15 minutes to a half hour.

Q Anybody there at Len-Al?

A Yes, there was.

Q Who?

A My sister-in-law and my wife.

Q What is your sister-in-law's name?

A Helen Goberman.

Q What is your wife's name?

A Frances Goberman.

Q What is her maiden name, your wife?

A Frances Smith.

Q Did you have another wife by the name of Frances?

A Yes, I did.

Q Did you have a wife by the name of Janet?

A No, I didn't.

Q You told us you used the name Masterson; is that right?

A That's correct.

Q Did you ever live with a woman that went under the name of Janet Masterson, your name?

MR. RITCHIL: I object to this.

THE COURT: That's too far removed.

Q How did you get to the doctor?

A My wife drove me.

Q Let me ask you this: This diner, any hospital near there?

A Yes.

Q What is the name of the hospital?

A Smithtown General.

Q did you go to the hospital?

A No, sir, I didn't.

MR. GILLEN: Excuse me a moment, your honor.

(Pause.)

Q Did you ever tell any representative of the Federal Government that you went to Len-Al after you left the stationhouse?

A I do not know, sir.

Q Did you ever tell any representative of the Federal Government that your sister-in-law, Helen Goberman, I think you said the name is --

A That's correct.

Q -- and your wife Frances were at Len-Al after you came from the stationhouse?

A I don't know, sir.

Q Haven't you spoken with Agent McMullen and Mr. Ritchie, the prosecutor in this case?

A Yes, I have, sir.

Q Have you ever told them this?

A I don't know, sir.

Q How many times have you been questioned by Agent McMullen?

A On various occasions, sir.

Q How many times?

A I could not tell you that exactly, sir.

Q More than 10?

A I really do not know, sir.

Q More than 20?

A I really do not know, sir.

Q More than 50 times have you spoken with Agent McMullen?

A No, sir.

MR. RITCHIE: Objection.

THE COURT: Yes. He said no.

Q May we have your best recollection, Mr. Goberman?

A I could not tell you exactly how many times.

THE COURT: Next question.

Q How many times have you spoken with Mr. Ritchie?

A On various occasions.

Q How many times?

A Quite a few, sir.

Q How many times?

A I do not know exactly how many times I have spoken with Mr. Ritchie.

Q More than 10?

A Yes.

Q Have you ever told Mr. Ritchie what you just told these ladies and gentlemen of the Jury here, about Helen Goberman and Frances Goberman?

A Yes, I have.

Q When?

A I don't recall, sir.

Q Was it in the past day?

A No, sir, it was not.

Q Past week?

A I would say yes, sir.

Q Where did this conversation take place?

A In Mr. Ritchie's office.

Q This is Wednesday; correct?

A I could nottell you the exact day, sir.

Q Today is Wednesday?

A Oh, yes, it is.

Q Was it this week that you told that to Mr. Ritchie?

A No, sir, it was not.

Q Was it last week?

A I do believe so, it was last week.

Q Who was present when you told him this?

A The woman -- I am pretty sure that the woman attorney that is sitting at the table.

Q Ms. Katz?

A Yes.

Q Was Mr. McMullen present?

A No, sir. Mr. McMullen was not.

Q Did Mr. Ritchie take a statement for you -- from you?

A What do you mean by take a statement?

Q Write it down.

A I do not know what Mr. Ritchie did. I was not

paying attention.

Q You told us here that you were limping when you left McNamara Buick; right?

A At that precise time, I don't know if I was limping, but I was limping when I reached the police station.

Q What about when you left the police station, were you limping then?

A Yes, sir, I was.

Q Badly?

A I don't know what you consider badly.

Q Well, was it noticeable, like this, that you were limping (indicating)?

A I would say a slight limp, not what you are gesturing.

Q Was it like this, just a slight limp?

A That's correct sir.

Q Were you limping when you went back to Len-Al?

A I could not honestly tell you that, sir.

Q Were you healed by this time?

A No, sir, I was not.

Q Now, what time was it you said when you went to the doctor?

A Approximately around 2:00 that afternoon.

Q Approximately around 2:00?

A That's correct.

Q How long were you at the doctor?

A Approximately 15 minutes.

Q Did he have you take your clothes off?

A Yes, he did.

Q What clothes did you take off?

A Shirt and pants.

Q Did he take any X-rays?

A No, sir, he didn't.

Q Did he give you any medication?

A Yes, he did.

Q What?

A He gave me a prescription of pills which I do not know what the contents of that prescription was.

Q Where is the prescription?

A With the druggist, I filled it.

Q Where is the druggist?

A I do not know which druggist it was, but I would assume it was one of them on Larkfield Road.

Q Do you know which druggist it was?

A No, sir, I do not.

Q Did the durggist actually fill this prescription?

A Yes, he did.

Q Did you pay for this prescription?

A Yes, I did.

Q Were you limping then?

A I do not honestly know, sir.

Q But it was a slight limp, in any event; correct?

A What do you mean by that, sir?

Q It wasn't a very noticeable limp (indicating)?

A No, sir, it was not.

Q Mr. Goberman, on September 12, 1973, did you testify in a Grand Jury and were you asked this question and did you give this answer: Page 6. Page 6 of September 12, '73. By Mr. Ritchie:

"Question: It's just a question of how severe you were limping. You believe that you were limping to the point where you were almost crawling; is that correct?

"Answer: That is correct."

Were you asked that question and did you give that answer to a Grand Jury?

A Yes, sir, I did.

Q Was it true at that time?

A Thats why I asked yu to what extent did you mean limping.

Q Were you almost crawling?

A No, sir, I was not.

Q But you told the Grand Jury you were almost crawling, isn't that right?

A That's why I had asked you to what extent do you mean limping.

Q Did you tell the Grand Jury that you were almost crawling?

A If that's what is in that testimony, I assume I did, sir.

MR. GILLEN: Will Mr. Ritchie concede I'm reading properly from the record?

MR. RITCHIE: Yes, your Honor, Mr. Gillen is reading properly.

MR. GILLEN: Thank you.

Q Did the druggist actually fill this prescription?

A Yes, he did.

Q What was it, pills, what?

A Pills.

Q How many?

A I don't know, sir.

Q How did he package it, a little vial, box or what?

A That I cannot honestly recall, sir.

Q Did you take this medication?

A I assume I did, sir.

Q Well, Mr. Goberman, do you have any recollection as to whether or not you actually took the medication that you say this doctor prescribed for you?

A I do not have no recollection of it, sir.

Q But you did take it?

A Yes, sir, I did.

Q Was anyone with you when you got this prescription filled?

A In the drug store itself?

Q Yes.

A No, no one was in the drug store itself when I had the prescription filled.

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Q Was there anyone waiting outside the drug-store foy you?

A Yes.

Q Who?

A My wife.

Q What date was it that you had the prescription filled?

A June 28th.

Q Now, you are familiar with Long Island, aren't you, Mr. Goberman?

A Very familiar.

Q Where was this drugstore located, will you please give us a description of the location?

A It had to be one of the drugstores on Larkfield Road.

Q How many drugstores are on -- Larkfield Road?

A That's correct.

Q How do you spell that?

A L-A-R-K-F-I_E_L_D.

Q Do you deal with these drugstores on Larkfield Road?

A No, sir, I do not.

Q This was the first you were ever in this drug store?

A That's correct.

Q Could you give us the cross street on Larkfield Road where this drugstore was located?

A As I said before, sir, I don't know which one. There were drugstores on Larkfield Road.

Q So you can't help us in locating this drugstore, is that correct?

A No, sir, I cannot.

Q How long was it after you left the doctor's office that you were at this drugstore?

A I would assume on my way away from the doctor's office.

Q You would assume. What is your best recollection, Mr. Goberman?

A That is my best recollection, sir.

Q What did you do then after you got this so-called prescription filled?

A I cannot tell you, sir, I do not recall.

Q Did you go to bed?

A I don't recall what I did, sir.

Q This would have been what, about 2:30 in the afternoon.

A Approximately.

Q Let me ask you this, these injuries, were you

confined to bed as a result of these injuries?

A I stayed in bed for awhile, but that could be, you know, not precisely thereafter. I cannot tell you precisely what time I went to bed.

Q Well, I'm not asking you if you went to bed that night. I'm asking were you confined to bed as a result of the injuries that you claim you had to these ladies and gentlemen here?

A I don't recall, sir.

Q What did you do that night, do you recall?

A No, I don't.

Q Did you go to dinner that night?

A I really don't recall, sir.

Q Did you go water skiing the next day with a girl by the name of Bonnie?

A No, sir.

Q With any girl?

A No, sir.

Q Do you know a place by the name of Sylvestri's?

A Yes, I do.

Q Were you in bed the next day?

A I don't recall. sir.

Q You don't recall if you were in bed or not for the whole day, is that correct?

A That's correct.

Q But you recall you didn't go water skiing?

A Yes, because at the time I went water skiing with Bonnie was almost Labor Day week-end on a Sunday.

Q You recall that just like that?

A That's correct, as we were just mentioning it, talking about it last week.

Q But you can't remember whether or not you were confined to bed for a number of days after these alleged injuries, is that right?

A That's correct, sir.

Q Did you ever claim that you were confined to bed because of these injuries, under oath?

A I don't recall that, sir.

Q You don't know whether you ever swore under oath that you were confined to bed as a result of these injuries?

MR. RITCHIE: Objection. Argumentative.

THE COURT: He's answered it already.

Q You told us you were involved -- what did you describe that as, a hijacking?

A That's correct, sir.

Q You said you were armed?

A That's correct, sir.

Q With what?

A With a 45 automatic.

Q Pistol?

A That's correct, sir.

Q Did it have these bullets in it, bullets.

A Did it?

Q Yes.

A I don't recall, sir.

Q You don't know whether the gun was loaded or not?

A It was loaded in the clip, but there was none in the chamber.

Q Explain that to the jury, will you, what that means.

A An automatic weapon has a clip with, maybe in layman's terms, bullets in it, the bullet that fires is the bullet that is in the chamber. You have to pull the slide back and the bullet comes out of the clip and into the chamber, then the gun will shoot.

Q There were no bullets in the gun?

A Not in the chamber itself.

Q Was the gun loaded?

A The gun was --

THE COURT: What he said was --

MR. RITCHIE: I object.

THE COURT: The bullets are nested in a clip. You have to transfer bullets from the clop to the firing chamber by taking some kind of action. Is that it?

THE WITNESS: That's correct, sir.

BY MR. GILLEN:

Q All you do is cock it, click, like that, right (indicating)?

A Cock it I think is pulling the hammer back. You pull the top part back and the bullet will come out of the clip into the chamber.

Q Then the gun was loaded, correct?

A To that extent, yes, it was, sir.

Q Did you take part in the planning of this hijacking?

A Yes, I did, sir.

Q How many people were involved in the hijacking?

A Approximately five, sir.

Q Did you also plan for the disposition of whatever you were going to steal after it was stolen?

A I was not involved in that end of it, sir.

Q But did you plan, was that part of the plan, to dispose of the goods?

A This was 14 years ago, sir. I don't recall.

Q I see. Did you get into the cab with the truck driver?

A Yes, I did.

Q Was he alone, the truck driver?

A I think he was, sir.

Q Did you put the gun to his head?

A I don't recall, sir.

Q Did you put the gun to his head and say, "You son of a bitch, do as I tell you or I'll kill you"?

MR. RITCHIE: Objection, your Honor. Part of that question was already asked and answered.

THE COURT: He may inquire.

A I do not recall, sir.

Q When is the last time that you did recall saying that?

A Saying what?

Q Put the gun to his head and tell him if he didn't do what you told him you'd kill him, when is the last time you did recall that.

A June the 5th when it happened to me.

Q You remembered about the hijacking --

A No, it's the incident where I had gotten beaten up on June 5th, 1972.

Q You remembered saying to the truck driver on June 5th --

A No.

THE COURT: He remembered on June 5, 1972, the earlier episode in his own life. Is that what you said?

THE WITNESS: That's correct, your Honor.

BY MR. GILLEN:

Q I am asking you about the episode when you hijacked the truck. Didn't you tell the truck driver, "Do as I tell you or I'll kill you"?

A Sir, that was 14 years ago. I was only 23 years old and I don't remember when it happened.

Q When is the last time that you did remember saying to the driver, "Do as I tell you or I'll kill you"?

A I don't recall saying that.

MR. RITCHIE: I object. Asked and answered.

MR. GILLEN: I will need a few moments, your Honor, to locate something.

(Pause)

MR. GILLEN: I will continue, your Honor, while co-counsel assists me.

Q Did you ever carry any other guns other than this 45, Mr. Goberman?

A Yes, sir, I did.

Q What kind of gun?

A I didn't carry it, but I've had them.

Q You didn't carry them?

A That's correct.

Q Where did you have them?

A In my automobile.

Q But you never took them out of the automobile, is that what you are telling us?

A Carrying a gun is when you carry it on your person.

Q I see. You just kept it in your car for ready use, is that what you are saying?

A For protection.

Q For protection?

A Yes.

Q What kind of guns did you carry for protection?

A I had a 32 caliber automatic.

Q Anything else?

A I could not recall every gun that I've ever owned.

Q Did you have other guns other than this 32 caliber automatic and the 45 you've already described?

A Yes, I have. A few years ago I threw them

all in the bottom of the river.

Q What other guns did you have?

A I have owned various guns.

Q What other guns, Mr. Goberman?

A I just couldn't tell you the caliber of every weapon I had.

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CROSS-EXAMINATION

BY MR. GILLEN: (Cont.)

Q How about a Magnum?

A I would assume I've owned a Magnum.

Q I'm not asking for assumptions. Did you or did you not own a Magnum?

A If my memory serves me correctly, yes, I did own a Magnum.

Q When?

A I couldn't tell you what year that was.

Q Your best recollection, Mr. Goberman?

A Maybe up until '69 or '70.

Q Did you keep that Magnum in your car for use?

A No sir, I did not.

Q Where did you keep that one?

A In the house.

Q Ever involved in a shoot-out, Mr. Goberman?

A Yes sir, I was.

Q Where you fired a gun; is that correct? You fired at another man?

A I do not specifically recall the details.

Q You don't remember if you ever fired a gun at another human being?

A I -- I do not think so, sir.

2 Goberman-cross/Gillen

Q You don't think so. That means you're not sure whether or not you ever fired a gun at another human being; is that correct?

A May I use --

Q Will you please answer my question?

A I'm asking you, may I say something?

MR. GILLEN: Your Honor, I would ask a direction to the witness to answer responsively to the questions.

THE COURT: He does not have to answer it in exactly the form that you dictate, if it cannot, in his sincere judgment, be fairly answered in that way.

MR. GILLEN: Sir, all I've asked is has he ever fired a gun at another human being. I don't think he has to explain that away.

THE COURT: I do not think it is quite that simple a question.

BY MR. GILLEN:

Q Go ahead.

A Approximately in 1960 or '61, some shylock was after a person and I went and told that person, told him to get away from the shylock. The shylock went after that person, took a -- and then I intervened and when he fired a shot, I fired back at his car.

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Q Then you do remember firihg a shot; is that right?

A That is correct, sir.

Q You just wanted to tell this story about defending someone; is that right?

A You're very good at twisting words.

MR. RITCHIE: Objection, your Honor; argumentative.

THE COURT: He may inquire.

Anyway, it does not matter. Move along.

MR. GILLEN: I would object -- well, all right.

Q Ever take a bulldozer and move a trailer with people in that trailer?

A Yes, I have.

Q People get hurt?

A No sir.

I was moving a -- a trailer with a cable on it and that cable slipped and the trailer dropped 6 inches and it was with the people's knowledge that I was moving the trailer.

It was on a construction site.

Q Did the people --did you know the people were in the trailer?

A Did I know?

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Q Yes.

A -Yes, I was, because I was only moving the trailer 4 feet.

Q You did know that the people were in the trailer; is that correct?

A That is correct.

MR. GILLEN: Excuse me, your Honor.

THE COURT: Yes. Certainly.

Q Now referring you to June 5th, 1972. You told us you went down to the McNamara Buick place, the building in Port Jefferson; is that right?

A That is correct.

Q Describe for us, please, the offices that you said you went into? What did they look like?

A There is an office in front of it. Then there is an office behind it. Approximately I would guess in the area of 8 to 9 feet by approximately 15 feet rectangular. That's on two exterior walls.

Q You had been to that office a number of times; isn't that right?

A Yes sir, I have.

Q How many times had you been to that office before June 5th?

MR. RITCHIE: Your Honor, I -- may we have the

direction that counsel stand back at the podium?

THE COURT: Yes, if you would, Mr. Gillen.

MR. GILLEN: Fine.

BY MR. GILLEN:

Q Do you have my question, Mr. Goberman?

A I was there on quite a few occasions.

Q Now, you described the room where you said all the defendants were in and some other people were in. Do you remember that?

A Are you talking on the ---

Q On the 5th?

A Correct.

Q And the room you say you were beat up in, okay?

A That is correct.

Q How big was that room?

A As I had said before, approximately 8 to 9 feet wide and approximately 15 feet in length.

Q Was that an office?

A Yes, it was.

Q Were there any desks in there?

A Yes, there was.

Q How many?

A I could not tell you that now, sir.

Q Was there more than one?

A Yes, there was.

Q Were there more than two?

A I do not recall if there was more than two.

Q Was there a drafting table in there?

A Yes.

Q Describe please for the ladies and gentlemen the dimensions of the drafting table?

A The drafting table is approximately 30 to -- 36 to 40 inches in width and approximately, according to which manufacturer, anywhere from 42 to 48 inches in length.

Q So it's about 3 by 4; is that right?

A That is correct.

Q And these two desks, were they average sized desks?

A It's according to what you call an average size desk. I'd say they're approximately 30 inches by 60 inch desks.

Q Any filing cabinets in that room?

A Yes sir, there was.

Q How many?

A I cannot tell you that, sir.

Q More than two?

A I do not recall, sir.

Q Any other furniture in the room?

A I do not recall, sir.

Q Chairs, right?

A Yes, there was.

Q How many chairs?

A Two that I'm sure of.

Q There could have been more; is that what you are saying? You're not sure?

A That is correct, sir.

Q How many people were in this room?

A Seven, myself and my brother was in there at a time also.

Q That's nine people in this room?

A That is correct, sir.

Q Did everybody have room to move around in this room, with all the furniture in it, 9 by 15?

A I'd say it was very tight, not what you would call comfortable.

Q You mean, you were really packed into that room; is that right?

A No sir; but it was tight, not what you would call comfortable, to my understanding of comfortableness.

Q Well, are you by "comfortable" meaning you weren't comfortable because all these people were beating

you up?

MR. RITCHIE: Objection, your Honor; argumentative.

THE COURT: Yes. Please no argumentative questions.

Q When you say "comfortable," what do you mean?

A Well, to my understanding of comfortableness, where there is a few square feet per people, per person.

Q So it was a crowded room?

A Yes, it was.

Q Were there other offices in and about this location?

A There is an office directly in front of it.

Q It's a business office; right?

A -That is correct.

Q Was there a desk in there, in this other room?

A Yes, there was.

Q How many?

A I do not know, sir.

Q Were there people working in there?

A Yes, there was.

Q And there are people in and out of there all day long; isn't that correct?

A To my general knowledge, yes sir.

Q Because this is a place of business?

A I said, "to my general knowledge, yes sir."

Q What connects, if anything, these two rooms?

A A door.

Q Was there a door there?

A Yes, there is.

Q A physical door between these two offices; is that correct?

A That is correct.

Q And you have no doubt about that in your mind?

A No doubt whatsoever.

Q Now, you said that there came a time -- I'll withdraw that.

Excuse me, your Honor.

Was the door shut at any time, Mr. Goberman?

A The door was shut on June 5, as soon as the beating started occurring.

Q This is the door between the two offices; is that right?

A That is correct.

Q You said on June 5 that you went back to Len-Al before you went to McNamara Buick; isn't that right?

A That is correct.

Q And you met your brother there; right?

A That is correct.

Q Was anybody else there when you went back?

A I think, to the best of my knowledge, my sister-in-law was also there.

Q Is that Helen?

A That is correct.

Q Did you have any discussions with Helen on June 5th?

A In reference to what, sir?

Q In reference to where you were going with Allen?

A Just that I would -- I wanted Allen to take a ride with me to Port Jefferson.

Q Did Helen say anything?

A I do not recall if and what she said.

(Continued on next page.)

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Q Did there come a time when you went back to Len-Al that day?

GR:jm T3pmR2

A Yes, there was a time.

Q What time?

A Approximately anywhere between three-thirty and five o'clock.

Q How did you get back there, to Len-Al?

A With my car.

Q Did your brother come back with you?

A Yes, he did.

Q Was anybody there when you came back on June 5th?

A I do not recall, sir.

MR. GILLEN: May I have this marked for identification, your Honor?

THE CLERK: Yes, sir. Marked for identification, Defendant McNamara's Exhibit G.

(So marked.)

BY MR. GILLEN:

Q Mr. Goberman, I show you Defendant's Exhibit G for identification. Tell me, please, whether or not you recognize this as a floor plan of that office you were in on June 5th, 1972?

A That's approximately the floor plan, sir.

MR. GILLEN: I offer this in evidence, your Honor.

MR. RITCHIE: Your Honor, I'm going to object. It has not been properly authenticated.

THE COURT: Perhaps you can look at it.

THE WITNESS: May I have one more look at that, sir?

THE COURT: Yes, surely. Wait until they look at it and it will be brought back to you.

THE WITNESS: Thank you, your Honor.

MR. RITCHIE: Your Honor, the Government will oppose the admission into evidence of that document. The Government will object to the admission into evidence

THE COURT: Just a minute. I think Mr. Goberman wanted to say something further about it before the offer is complete, I expect.

MR. RITCHIE: Yes, sir.

THE WITNESS: Yes. In this plan there is an archway drawn up between the outer office and the inner office. There was approximately a two six six eight door. If the -- if you put the handle on the right, it swung to the left. In other words, it was hinged on the left-hand side, pushing in. This one shows an archway, not a door.

MR. RITCHIE: Your Honor, may I have a voir dire?

THE COURT: This one shows?

THE WITNESS: An arch, not a door.

THE COURT: A doorway but no door?

THE WITNESS: That is correct. As far as technical terminology. This shows no door and the one, the two six is a door.

MR. RITCHIE: May I have a voir dire on this?

THE COURT: Yes, certainly.

MR. FISCHETTI: Is Mr. Ritchie withdrawing his objection at this point?

THE COURT: He has already entered his objection.

MR. FISCHETTI: I see.

THE COURT: As I understand it, he would like to ask some questions in support of his objection.

MR. FISCHETTI: Thank you, sir.

THE COURT: Is that right?

MR. RITCHIE: Yes, your Honor.

VOIR DIRE EXAMINATION

BY MR. RITCHIE:

Q Do these floor plans or blueprints normally contain a caption on them?

A In what respect?

Q As to what they're a plan of?

A Yes, they do.

Q Is there any caption on that document?

A Yes, there is; Proposed Alteration for McNamara Buick Dealer. It was not as is.

Q What is the date on that proposed alteration?

A September 20, 1973.

Q Is that before or after the time that you were in McNamara Buick-Pontiac?

A It was after the time. I was in June 5th,1972.

MR. RITCHIE: Your Honor, the Government would object to the admission of this into evidence as being not probative whatsoever of the physical condition of that building on June 5th, 1972.

THE COURT: That objection must be sustained.

MR. GILLEN: Fine.

CROSS-EXAMINATION

BY MR. GILLEN (continued):

Q Now, you have no doubt in your mind that there was a door there; isn't that right, Mr. Goberman?

A That is correct, sir.

Q And you have no doubt in your mind that when this alleged beating took place, that door was shut; is that right?

A That is correct.

Q Absolutely no question?

A Absolutely no doubt whatsoever.

Q Now, you told us on direct examination that you used a number of names other than your true name; is that right?

A That is correct, sir.

Q What were those names?

A Frank Masters, Harry Masters, Harry Masterson, Russell Lambert, Jack Slade, Harry or Harold Goldman.

Q Did you ever use any other aliases?

A Not to my knowledge, sir.

Q What do you mean, not to your knowledge? Would you explain that to the jury?

THE COURT: No, not that you --

THE WITNESS: Not that I recall, sir.

THE COURT: Not that you recall.

Q When did you stop using aliases or have you stopped using aliases?

MR. RITCHIE: Objection, your Honor; assuming facts not in evidence.

MR. GILLEN: Has he stopped using aliases?

THE WITNESS: I'm using a different name in connection with employment.

BY MR. GILLEN:

Q Can you tell us why?

A Why?

Q Yes.

A Because of -- it seems every time I go for a new job someplace, somehow or other somebody gets to it.

Q You use a different social security number every time you go for a job?

A That is correct.

Q Do you know a man by the name of Benakas?

A Yes, I do.

Q Isn't it a fact that you have just swindled that man out of twenty thousand dollars?

MR. RITCHIE: Objection.

A (continuing) Is it a fact?

MR. RITCHIE: Objection to the argumentative form of that question.

Objection also to the fact that it is improper impeachment and that it's an alleged prior immoral act not resulting in conviction.

THE COURT: Yes.

MR. GILLEN: May I have this marked for identification, please?

THE CLERK: Yes, sir. Marked for identification Defendant McNamara's Exhibit H.

(So marked.)

BY MR. GILLEN:

Q I show you this card. Did you work for this

7 company?

A Yes, I did.

Q And didn't you use a phony license to get that job?

A What do you call "a phony license"? You're not required to have a license to get that job.

Q Aren't you required to have a license if you're going to sell home improvements in the City of New York?

A Yes, you are.

Q Didn't you use a phony license to get this job?

A There is a legitimate license of the City of New York. May I tell you one thing, Mr. Gillen? Mr. Benakas was swindling people. I went to the homeowners and told them don't pay him the material and supplies. They got beat out of money.

MR. RITCHIE: Objection.

THE COURT: Move to strike?

MR. RITCHIE: Move to strike.

THE COURT: That motion is granted.

Do not volunteer, Mr. Goberman.

(continued on next page)

Shapiro T4pmR1 follows

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Q You were protecting the citizenry --

THE COURT: I won't allow you to ask a question on the basis of something stricken from the record.

MR. GILLEN: I do not know whose objection we were talking about. The objection to Mr. Goberman's outburst or the objection to my question.

MR. RITCHIE: There was only one objection on the floor and that was to Mr. Goberman's voluntary answer.

Q How many corporations do you have, Mr. Goberman?

A How many corporations do I have? Two at the present, sir.

Q What are the names?

A HarMac Contracting Corp. and Farmingville Realty Corp.

Q Have you ever had any other corporations?

A Yes, I have.

Q What are the names?

A Twin Fork, East-Gull Concrete.

Q Any others?

A State Steel and probably a few others that I don't recall.

Q Probably a few others? How many others?

A I do not recall.

Q Do you owe any monies under the names of those corporations?

A Yes, I do.

Q How much?

A Up to the area of $150,000.

Q Where did you get that figure?

A From you, Mr. Gillen.

Q That's right.

Have you made arrangements to repay those monies?

A Some I am repaying now.

Q Who are you repaying?

A Various -- a couple of the suppliers I am dealing with now.

Q What are their names?

MR. RITCHIE: I am going to object to this.

THE COURT: We are going too far afield, Mr. Gillen.

MR. GILLEN: Your Honor, I respectfully submit this witness --

May we have this at sidebar?

THE COURT: I have already ruled, Mr. Gillen.

Q Mr. Goberman, have you ever used the name Chapman?

A No, I have not.

Q Have you ever lived at 81 Hanrahan Avenue, Farmingville, New York?

A That's correct.

Q Did Mr. C. R. Chapman ever live at that address?

A No, he did not.

MR. GILLEN: May we have this marked for identification, please.

THE CLERK: Marked for Identification as Defendant McNamara's Exhibit I.

Q What year or years did you live at 81 Hanrahan Avenue?

A If I may answer, sir, I think I know the point you are getting at --

MR. GILLEN: I most respectfully object.

THE COURT: Answer the question.

MR. RITCHIE: I move to strike.

THE COURT: Motion to strike is granted.

Q What years did you live at 81 Hanrahan Avenue?

A From approximately 1967 to 1971.

MR. GILLEN: May I have this marked for Identification?

THE CLERK: Document marked for Identification as Defendant McNamara's Exhibit J.

Q I show you this photo, Exhibit J. Do you

recognize it?

A Yes, I do.

Q What is it?

A A photo of 81 Hanrahan Avenue.

Q Now, you have told us there was no Mr. Chapman living there; is that correct?

A Correct.

Q Is this a private home?

A Correct.

Q It is not an apartment house?

A No, sir, but there was an office up there for Twin Forks and East Gull and Mr. Chapman worked for me as a superintendent.

Q Take a look at this -- did you ever see that before?

A It is Mr. Chapman's credit card for the corporation work of mine and of the office at 81 Hanrahan Avenue.

MR. GILLEN: I offer it into evidence.

MR. RITCHIE: May I see it, Mr. Gillen, please.

(Document shown to counsel.)

MR. RITCHIE: I would object on the grounds of relevancy and lack of authentication.

(Document shown to Court.)

THE COURT: It isn't the credit card --

MR. GILLEN: It is a photostatic copy thereof.

THE COURT: Are we not getting rather far afield here?

MR. GILLEN: I do not believe so, your Honor.

THE COURT: Please move along quickly.

MR. GILLEN: Is this a convenient time for a break, your Honor? It is 3:30.

THE COURT: All right, we will have a short recess.

Please do not discuss the case with one another or with anyone not on the jury until it is given to you to decide.

(Recess taken.)

BY MR. GILLEN:

Q Mr. Goberman, have you used the name Lambert Russ, 81 Hanrahan Avenue, Farmingville, New York?

A Yes, I told you I used the name Russell Lambert.

Q Lambert Russ, R-u-s-s, 81 Hanrahan Avenue, Farmingville, New York.

A It may be an abbreviation, sir.

Q Have you ever used F. A. Lambert?

A No, sir.

Q At 81 Hanrahan Avenue, Farmingville, New York?

A No, sir, I have not.

Q You used the name Russell Lambert, 81 Hanrahan Avenue, Farmingville, New York; is that correct?

A Yes, I have told you so.

Q Have you used the name Wally Masters, 81 Hanrahan Avenue, Farmingville, New York?

A Not to my knowledge.

Q Have you used the name Harry Masterson, Farmingville Realty, 9 Oriol Place, Farmingville, New York?

A Yes, I told you Harry Masterson.

Q You haven't used the name Wally Masters?

A That is correct.

Q What is your best recollection as to Wally Masters?

A I do not have any recollection of that name.

Q Have you used the name Harry Masters, Belvedere Manor, Belvedere, New Jersey?

A I told you I used the name Harry Masters.

Q Have you used it with that address?

A Yes, because I did work -- I worked in Belvedere, New Jersey.

Q Do you owe people money under the name Harry Masters?

A Yes, I do.

Q How much money?

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A No, sir, I do not know.

Q Have you used the name Harry Masterson, East Gull Concrete Corporation, 81 Hanrahan Avenue, Farmingville, New York?

A Yes, I told you that already.

Q Do you owe people money under that name?

A Yes, I do.

Q How much?

A I do not know.

Q Who do you owe the money to?

A I do not recall.

Q Have you used the name Harry Lambert, 81 Hanrahan Avenue, Farmingville, New York?

A I do not recall that name.

Q Have you ever used it?

A It is possible, but I doubt it.

Q Do you know whether you owe money to people under that name, Harry Lambert?

A No, I would not.

Q Have you used the name Harry Slade, 81 Hanrahan Avenue, Farmingville, New York?

A No, sir.

Q Have you ever used Harry Slade?

A No, sir.

Q Do you owe money under that name?

A No, sir, I do not.

Q Are there judgments against you in that name?

A Not to my knowledge.

Q Have you used the name Russell Slade, 81 Hanrahan Avenue, Farmingville, New York?

A No, sir, I have not.

Q Are you sure of that?

A I am very sure.

Q Any judgments against you under that name?

A Not to my knowledge.

Q Has Russell Slade lived at 81 Hanrahan Avenue?

A No, sir.

Q Has Harry Lambert lived at 81 Hanrahan Avenue?

A No, sir.

Q James Harry Slade, 81 Hanrahan Avenue, Farmingville, New York, ever use that name?

A Not to my knowledge.

Q You are not sure?

A That's correct.

Q Does the name Harry Slade -- did he live at 81 Hanrahan Avenue?

A No, sir.

Q Harsal Enterprises, 81 Hanrahan Avenue,

Farmingville, New York.

MR. RITCHIE: Objection, your Honor, irrelevant.

THE COURT: Overruled.

THE WITNESS: Please repeat it.

Q Harsal Enterprises, Incorporated, 81 Hanrahan Avenue, Farmingville, New York.

A Not to my knowledge.

Q Do you have such a corporation?

A Not to my knowledge.

Q Who is Janet Sontag?

A A woman I used to know.

Q Is her name also Janet McCarthy?

A Yes.

Q Did she ever live at 81 Hanrahan Avenue?

A Yes.

Q Did you have anything to do with the Harsal Enterprises, Incorporated?

A Not to my knowledge.

Q Did she?

A I really do not know.

Q Ever use A. Frezza, 81 Hanrahan Avenue, Farmingville, New York?

A No, sir.

Q Did A. Frezza ever live at 81 Hanrahan Avenue,

Farmingville, New York?

A No, sir.

Q Harold Johnson, 81 Hanrahan Avenue, Farmingville, New York, ever use that name?

A No, sir.

Q Did Harold Johnson ever live at 81 Hanrahan Avenue?

A No, sir.

Q Is this the private home that I showed you the picture of?

A Yes.

Q Ever use Harold Haberman, 81 Hanrahan Avenue, Farmingville, New York, ever use that name?

A Not to my knowledge.

Q You are not sure?

A That one I am not sure of.

Q Do you owe any money to anyone under that name?

A Not to my knowledge.

Q Any judgments against you?

A Against me personally?

Q Right, against Harold Haberman.

A Not to my knowledge.

Q Harry Goberman, 118 Southern Boulevard, Hauppauge, New York, ever live there?

A Yes, sir.

Q Owe any money to anyone as Harry Goberman at 118 Southern Boulevard, Hauppauge, New York?

A Yes, I do.

Q Who?

A I do not know.

Q How much?

A It cannot be too much.

Q How much?

A I do not know the exact amount, sir.

Q James Slade, 81 Hanrahan Avenue, Farmingville, New York, ever use that name?

A Not to my knowledge.

THE COURT: I think that was asked.

THE WITNESS: Yes.

MR.GILLEN: He admitted to that one on direct.

THE WITNESS: I said Jack Slade.

Q Jack Slade?

A Yes.

Q Ever called Shotgun Slade?

A Not to my knowledge?

Q Ever called Bat Masterson?

A I have heard somebody call me that.

Q What's your name?

A My name is Harold Goberman.

Q People call you Bat Masterson?

A Someone had said that in a joke, if I remember correctly.

Q Harold Gab, 81 Hanrahan Avenue, Farmingville, New York, ever use that one?

A No, sir.

Q You mean you are not sure?

A I am sure, not to my knowledge.

Q You are sure not to your knowledge?

A That's correct, sir.

MR. GILLEN: Your Honor --

THE COURT: You know you didn't?

THE WITNESS: To my knowledge I did not use that name.

THE COURT: See, that is the ambiguity. Do you mean by that that you know you did not?

THE WITNESS: I know I did not use that name.

Q Harold Gab, did he ever live at 81 Hanrahan Avenue, Farmingville, New York?

A No, sir, he did not.

Q Frank Masters, 81 Hanrahan Avenue, Farmingville, New York, ever use that one?

A Yes.

Q Do you owe anybody any money under that name?

A Yes.

Q How much do you owe?

A I cannot tell you the exact amount.

Q Who do you owe it to?

A I could not tell you that either.

Q Henry Goberman, 81 Hanrahan Avenue, Farmingville, New York, have you ever used that one?

A Yes, I did.

Q Owe any money under the name of Henry Goberman?

A No, sir.

Q Have any judgments against you in the name of Henry Goberman?

A I do not think so.

Q Are you sure?

A I am pretty sure.

Q Did you tell this jury about Henry Goberman on direct?

A I do not recall that name.

Q Harry Goberman, HarMac Contractors, 118 Southern Boulevard, Hauppauge, New York, ever use that one?

A Yes.

Q Owe anybody any money under that name?

A Yes, I do.

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Q Who?

A The various -- some various contractors that worked on McNamara.

Q In fact you owe Mr. McNamara -- he has a judgment against you in the name of HarMac?

A Not to my knowledge.

MR. RITCHIE: Objection, totally irrelevant to the scope of this case.

THE COURT: I am sorry, I was checking another matter.

MR. GILLEN: I asked, your Honor, if he owed Mr. McNamara on a judgment in the name of HarMac.

THE COURT: Well, doesn't that arise out of matters later than the period we have under discussion here?

MR. GILLEN: Your Honor, it arises out of the use of various names and addresses --

MR. RITCHIE: I ask it be --

THE COURT: You may not testify.

MR. GILLEN: Fine, I will go on, your Honor.

THE COURT: Yes.

(Continued on next page.)

HS/nc
PM3

CROSS-EXAMINATION

BY MR. GILLEN: (Cont.)

Q Henry Goleman, 81 Hanrehan Avenue, Farmingville, New York.

Did you ever use that one?

A No.

Q Owe any money under that name?

A No.

Q Did Henry Goleman ever live at 81 Hanrehan Avenue?

A No, sir.

Q Harry Goldman, 81 Hanrehan Avenue, Farmingville, New York.

Ever use that one?

A Yes, sir.

Q Did you use it when you were at 81 Hanrehan AVenue?

A I don't recall.

Q That's the one that you were -- you used in connection with the job; is that correct?

A That's correct, sir.

Q That's the one you say you have a license; is that correct?

A Correct, sir.

Q I again show you Defendant's Exhibit E for identification.

Is an application number up here?

A Yes.

Q Is that your license number?

A I could not tell you, sir.

Q Who wrote that down?

A It looks like my handwriting.

Q It is yours?

A It looks like it.

Q It looks like it.

As a matter of fact, didn't you present this document to this girl Judy to get the job?

A I do not recall, sir.

Q I show you this application for employment, did you present Defendant's Exhibit E in connection with Defendant's Exhibit F for identification for a job?

A I do not recall, sir.

Q Will you look at it, please and give us your best recollection?

A To my best recollection, I do not recall, sir.

MR. GILLEN: I'm sorry, your Honor.

Q What does that mean: "To the best of my

recollection, I do not recall"?

A In other words, it means it is not in my memory at the present time.

Q What do you mean "at the present time," would you remember it tomorrow?

A If there was some documentation or something to refresh my memory.

Q Here is your documentation. Isn't that in your handwriting, Exhibit E?

A It looks like mine -- it's not like a signature or anything but numbers on there. The top number and the bottom number looks like the same -- one says, received by -- it sure couldn't be the same person's writing one number and the other number or it could be, I don't know.

Q Did you make that document out?

A I couldn't make the document out.

Q I mean fill in the number up here, did you write that number?

A I really do not know, sir.

Q What's the date on that document?

MR. RITCHIE: Objection, your Honor, unless it's in evidence.

THE COURT: I don't think it's in evidence.

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MR. GILLEN: It's not. I am just asking for a date.

THE COURT: He may answer.

MR. RITCHIE: Yes, your Honor.

THE WITNESS: Looking at this, which I know is my writing and looking at the numbers up there, the letters are not the same, so I would assume it's not.

BY MR. GILLEN:

Q I asked you for the date.

A 7/10, 16, 14 or 19 --

Q Of what year?

A '74.

Q Two months ago?

A Correct.

Q What documents did you present for a job?

A You do not present documentation for a job.

Q You did not present any documentation for a job; is that what you are saying?

A That's correct.

Q Did you present this document here, Exhibit F, for the job?

A Yes, I did.

Q And you filled that out?

A Correct.

Q Did you present Defendant's Exhibit E for the job?

A I do not know, sir.

Q Did you write these numbers?

MR. RITCHIE: Your Honor, I would object on the grounds of relevancy.-

THE COURT: We have been over this --

MR. GILLEN: He has given two answers.

THE COURT: You have had quite enough to make your point.

Q You told us that you did have a license?

A Correct.

Q Where is the license?

A At home, sir.

MR. GILLEN: May we have a direction to have it produced or I will serve a subpoena.

THE COURT: When you go home, would you see that you can arrange to have it here tomorrow?

THE WITNESS: Yes, sir, your Honor.

BY MR. GILLEN:

Q Harry Goberman, 42 Ridge Road, Smithtown, New York; did you ever use that name and address?

A Yes, sir.

Q You owe any money under that name?

A Yes, sir. I had told you that.

Q How much do you owe?

A I do not know, sir.

Q This is a different address, I am saying under the address 42 Ridge Road, with the name Harry Goberman, do you owe any money?

A Not to my knowledge.

Q Any judgments against you?

A Personally, yes.

Q Harry Goberman, Town House Apartments, Hauppauge, New York, did you ever use that one?

A Yes, sir. I believe I used it at various locations.

Q Did you owe any money as Harry Goberman, Town House Apartments, Hauppauge, New York?

A Not to my knowledge.

Q Any judgments against you?

A At that address I do not believe so.

Q State Steel Pinkey Corporation, 1 Indian Head Road, Commack, New York; ever use that?

A Yes.

Q Do you owe any money under that?

A Yes.

Q How much?

A I could not know the exact payment.

Q Who do you owe the money to?

A I could not tell you that.

Q Harry Golden, did you use that one?

A Not to my knowledge.

Q You are not sure?

A Not to my knowledge, sir.

Q Do you have any present recollection as to whether or not you have used the alias Harry Golden?

MR. RITCHIE: Objection, asked and answered.

THE COURT: Is it the same name?

MR. GILLEN: It's different.

THE COURT: I thought it was Goldman?

MR. GILLEN: This is Golden.

THE COURT: You just asked him about that.

BY MR. GILLEN:

Q W. Gorsman; did you ever use that one?

A No.

Q M. Gorsman, ever use that one?

A No, sir.

MR.GILLEN: May I have this marked for identification.

THE CLERK: Yes, sir.

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Marked for identification, Defendant McNamara Exhibit K.

Q Did you ever live at 5 Wishbone Road in Melville?

A Correct.

Q I show you Defendant's Exhibit K for identification, did you sign that document?

A Yes, I did.

Q Is that an application for a credit card from the Shell Oil Company?

A Yes.

Q Did you put true and correct information on that document?

A Everything except my social security number.

Q What is your social security number, Mr. Goberman?

A 117 282 475.

Q What's the social security number on that credit card application?

A 117 282 075.

Q Isn't it a fact that you used different information as to the social security number to get this credit card?

A No, sir.

(continued next page.)

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CROSS-EXAMINATION

BY MR. GILLEN: (Cont.)

Q Can you tell us why then you used a different social security number?

A The difference is 2075 and 2475. I must have probably forgotten the second digit of the last set of digits.

Q It was an accident?

A That's correct, sir.

Q I show you again exhibit F and ask you, sir, is there a different social security number on that application for employment?

A That is correct. 2975.

Q Is that a mistake?

A No sir, it is not a mistake.

Q That one you did on purpose?

A That's correct.

Q This one you said you made a mistake on?

A That's correct.

Q How many other social security numbers have you used, Mr. Goberman?

A I could not tell you that, sir.

Q Have you used others?

A Yes I have.

Q To your best recollection, how many social

security numbers have you used?

MR. RITCHIE: Objection, your Honor, asked and answered.

THE COURT: No, he asked him how many has he used.

MR. RITCHIE: Yes, your Honor.

A I do not recall.

Q More than 10?

A I would assume not.

Q Isn't it a fact that you put false information on applications for credit cards in order to defraud the companies?

A No sir.

Q Do you owe any money to any credit card companies?

A No sir, I do not. All my credit cards are up to date.

Q What credit cards do you have?

A I'd have to look up and see which ones I have.

Q Which ones do you have, to your own recollection?

A A & S, Macy's, Sears, Lease-A-Plane.

Q Under what names?

A Harry Goberman, except Lease-A-Plane, that is under Harry Masterson, which is my pilot's license under.

Q On your pilot's license, did you make a n application out for that?

A - What type of application are you referring to, sir?

Q What type of pilot's license did you get?

A I have a pilot's license.

Q Is there more than one application for a pilot's license?

A If I may put in a correct term, the original one is issued to you as a medical certificate. After you pass your exams then the permanent one comes in. The doctor issues it, and I don't think it is a regular application.

Q Are there any questions on the application about ever being convicted of a felony?

A I do not recall, sir.

Q You said you had a driver's license in the name of Masterson?

A I did have one, sir.

Q Where is it now?

A I sent it in to the State.

Q When was this?

A A while back.

Q How long did you use that license?

A From 1964 up until this present year.

Q Was there any reason why you didn't have the license in your true name, Harold Goberman?

A Yes, there was.

Q What was that?

A Because I was under the impression that my name was changed legally and then the attorney had died and I found out in 1973 it was not.

Q Was your license revoked under the name of Goberman?

A Yes, it was. I think it was suspended.

Q For what?

A Two speeding tickets.

Q And isn't it a fact then you just went around and then made out another application under a phony name to get another driver's license?

A No sir, I waited three years.

MR. RITCHIE: Objection. This has been asked and answered. This is an argumentative question.

THE COURT: He said no, he waited three years.

MR. RITCHIE: Yes, your Honor.

Q Did you disclose on your application for a New York State driver's license that your license had been revoked under your true name?

A No sir, I would assume I did not disclose that.

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Q You assume you did not disclosed it?

A That's correct, sir.

Q You have no recollection as to whether or not you disclosed that?

A I couldn't recall exactly what I had written on an application 10 years ago.

Q Do you recall whether or not it was asked on your application for a license whether or not a license had ever been suspended or revoked on you?

A I do not recall, sir.

Q FAA, is that the Federal Aviation Administration?

A Yes sir, it is.

Q Have you ever disclosed to them your felony convictions?

A No sir, I have not.

Q Have you ever informed them of your true name?

A No sir, I have not.

Q Have you made any present applications now for a New York State driver's license?

A Yes sir, I have.

Q Under what name?

A Harold Goberman.

Q Where did you make the application?

A Westbury.

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Q Do you have a copy of that application?

A No sir, I do not.

Q Did you put on that application that you had been using the name Masterson on a driver's license?

A Yes sir, on a computer check it came back. When I filled out the application it showed that my license was revoked in 1964.

Q Have you gotten a new license?

A No sir, I have not.

MR. HITCHIE: Your Honor, I am going to ask that that entire line of questioning be stricken.

THE COURT: I think the motion should be denied. The answers are not damaging.

BY MR. GILLEN:

Q Mr. Goberman, on January 10, 1974, were you asked these questions and did you give these answers, sir, page 604, line 15:

"Question: In Pennsylvania you worked on a job in Pennsylvania, didn't you, Mr. Goberman?

"Answer: Yes, I did.

"Question: Did you ever take a bulldozer and run it into a construction trailer?

"Answer: No, I moved the construction trailer with a bulldozer with chains on it.

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"Question: And there were people in that trailer, weren't there, Mr. Goberman?

"Answer: Yes, but I did not know people were in it. The trailer was hooked up with chains to move it as you normally move any vehicle.

"Question: But you didn't know there was anybody in that trailer?

"Answer; No, sir, I did not."

Were you asked those questions and did you give those answers?

A Yes sir, I did.

Q Did you or did you not tell this jury that you knew people were in that trailer, just a few minutes ago?

A Yes sir, because I checked into it in the last three weeks.

Q So then you were mistaken in your prior - testimony?

A As to the move on the trailer, yes sir.

Q You say you checked into it in the last three weeks?

A That's correct.

Q Did you go to Pennsylvania?

A No sir.

Q Did you talk to the people that were in the

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trailer?

A No sir.

Q Did you reread your testimony?

A No sir, I did not.

Q You have told us the events of June 5, is that correct?

A That is correct, sir.

Q Do you recall those events as you sit here now?

A Yes sir, I do.

Q And you prepared your testimony with Mr. Ritchie, have you not, discussed it before you got on the stand?

A Yes I have.

Q And you have told the ladies and gentlemen everything that occurred on that day, is that right?

A That is correct, sir.

Q At another time under oath did you swear that you were beaten with blackjacks?

A Yes sir.

Q Did you tell that to these ladies and gentlemen here today?

A No sir.

Q At another time under oath did you claim that each and every person in that room beat you with a blackjack?

MR. RITCHIE: Objection, unless we fix the time.

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Q November 27, 28, 29 and 30 of 1973.

MR. RITCHIE: Your Honor, I believe we can be more specific than that.

MR. GILLEN: It would take a great deal more time to be more specific.

THE COURT: I think that we have been over this once before, haven't we, Mr. Ritchie?

MR. RITCHIE: I am not certain that I understand your Honor.

THE COURT: Come up.

(Side bar.)

THE COURT: Remember we went around and around on this at the last trial? It was during the deposition in the civil case, I think. Is that correct?

MR. RITCHIE: Yes.

THE COURT: And I think they went on for yards after weary yards; I don't know how long it would take to find it.

MR. GILLEN: Five days, the depositions.

THE COURT: You must have the page located, framed in red.

MR. GILLEN: I can't pick them out. But it does take a great deal of time.

MR. FISCHETTI: Just opening this now I find

that "Then I got the blackjack beating ...." -- I don't know if that's the point.

THE COURT: Didn't he say collectively that every single one of the people in the room hit him with the blackjack --

MR. FISCHETTI: Back to back.

MR. GILLEN: Hand to hand.

MR. FISCHETTI: It is in the EBT and also in his testimony.

THE COURT: It is in there somewhere.

MR. FISCHETTI: We will have to find it.

THE COURT: I think if you identified the occasion to him, that may refresh his recollection.

MR. GILLEN: In the examination before trial. I thinkit was November 30th.

MR. RITCHIE: With that kind of specification, your Honor, I wouldn't oppose it.

THE COURT: All right. Because the law suit has been mentioned already in the opening, so it won't be any surprise to the jury that it took place.

MR. RITCHIE: I had wanted it in the evidence.

THE COURT: Don't go around explaining that it is a gift horse, will you.

(In open Court.)

BY MR. GILLEN:

Q Mr. Goberman, isn't it a fact that you have law suits pending against all of these defendants in connection with this alleged beating?

A Yes sir, I do.

Q How much are you suing for?

A Somewhere in the area of a million six hundred thousand dollars.

Q Isn't it a fact, in connection with that law suit you claimed certain injuries to your body?

A That is correct, sir.

Q What parts of your body were injured?

A Various parts of my body.

Q Which parts is that?

A I just -- I do not know the medical terms. I am not a physician, sir.

Q You know what the word head means, don't you?

A Yes, I do.

Q Head?

A Yes.

Q You know what the word arms means?

A Yes, I do.

Q You know what the word feet means? Elbow, leg, you know all these words?

A Yes, I do.

Q They are not medical terms, is that correct?

A That is correct.

Q Will you tell these ladies and gentlemen what parts of your body were injured?

A Just various parts of my body, what was described on that letter from the doctor.

Q In your law suit, did you claim injuries to various parts of your body?

A Yes, I did.

Q What parts of your body did you say were injured?

A The way I think it was written in the law suit, the attorney wrote that -- I do not understand the medical terminology of it.

Q Oh, it was all written in medical terminology, is that it?

A From what I understand.

Q You mean you don't know?

A I do not understand the terminology in which it is written.

Q In your own words, layman's terms, will you tell this jury now what parts of your body were injured?

A Various parts of my body.

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Q Will you please specify which parts?

A Like I knew the head, the arms, my legs and then my chest was hurting.

Q What about your feet?

A The legs are on my feet, sir.

Q What about your hands?

A My hands is my arms, sir.

Q What about your nose and your mouth?

A From my general knowledge, it is my head, which my head does consist of my mouth, eyes, ears and so forth.

(Continued on next page.)

GR

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

Andrew J. Cusack being duly sworn, deposes and says that deponent is not a party to this action, is over 18 years of age and resides in the City of New York, State New York. On March 14 1975 deponent served one four-volume set of the Appendix for Appellant McNamara

upon:

Robert Plaxico, Esq.
P. O. Box 14236
Washington, D.C. 20044

attorney(s) for party(s) in this action, at the address(es) designated by said attorney(s) for that purpose by:

MAIL [x] depositing a true copy(s) of the same securely enclosed in post-paid wrappers in a Post Office Box regularly maintained by the United States Postal Service at No. 1 Chase Manhattan Plaza, in the City and County of New York, directed to said attorney(s) at the address(es) set out under his name(s); that being the address(es) within the state designated by him for that purpose in the preceding papers in this action.

LETTER DROP [ ] depositing a true copy of the same, enclosed in a sealed wrapper directed to said attorney(s), in the letter drop or box of, and accessible from without, of said attorney(s) office at the address(es) set out under the name; and that said office was not open at the time of service.

PERSON IN CHARGE [ ] delivering a copy of the same to and leaving the same with the person in charge of said office, said attorney(s) being absent therefrom at the time of said service.

Sworn to before me this
14th day of MARCH, 1975

Andrew J. Cusack

ALEAN D. MAYER
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-2592925 New York County
Term Expires March 30, 1977